

(24,354.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 235.

THE HUTCHINSON ICE CREAM COMPANY AND C. J.  
HUTCHINSON, MANAGER, PLAINTIFFS IN ERROR,

*vs.*

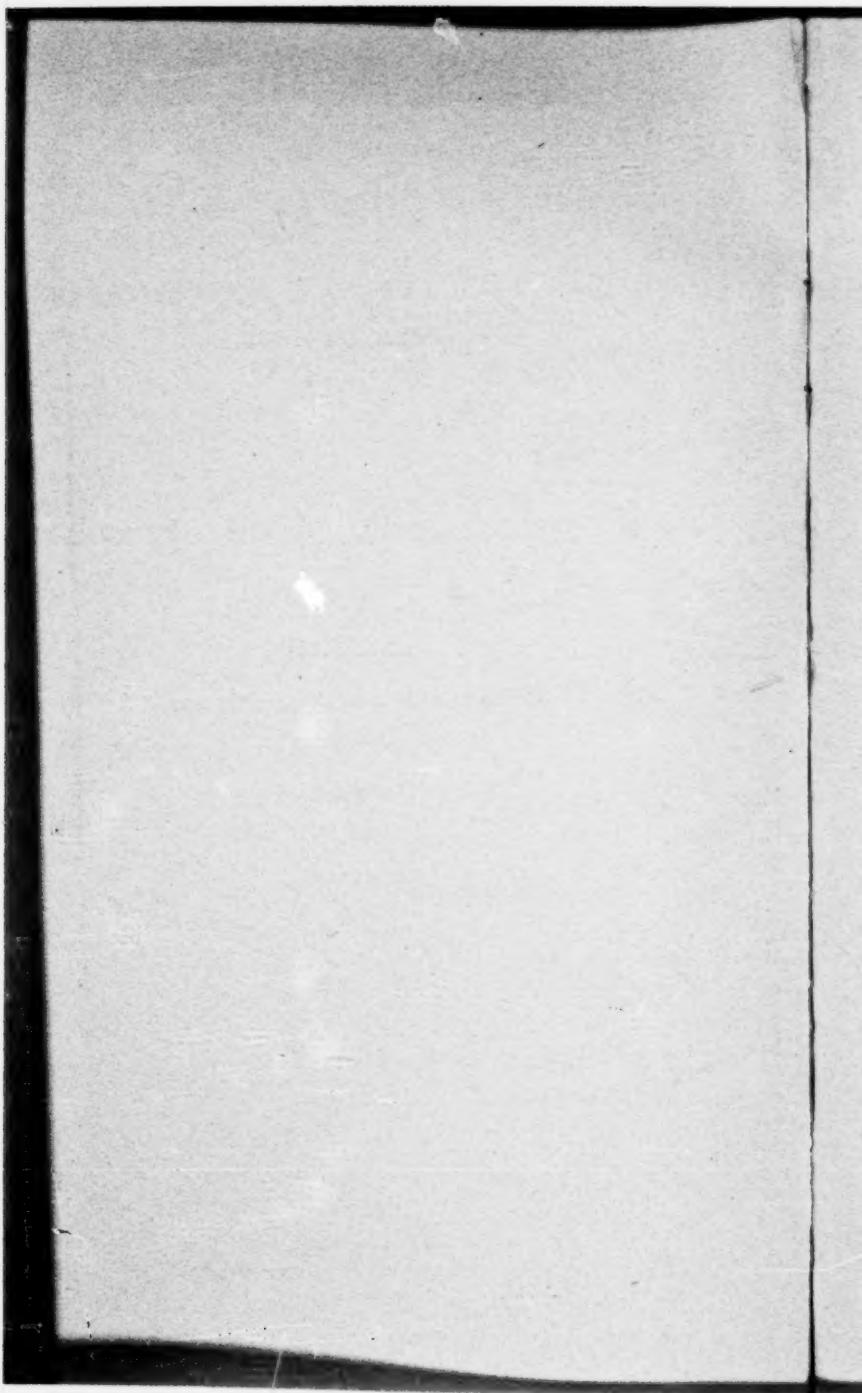
THE STATE OF IOWA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

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1 In the Supreme Court of the United States of America.

29785.

STATE OF IOWA, Appellee,

v.

HUTCHINSON ICE CREAM Co. and C. J. HUTCHINSON, Manager,  
Appellants.

Appeal from the Supreme Court of the State of Iowa.

This cause having been presented on Motion to advance on January 23rd, 1914, is ordered advanced and that the same be presented at the April period of this Term of said Court.

And on April 9th, 1914, this cause is submitted together with No. 29,785, (State of Iowa, Appellant, v. Sanders Ice Cream Co., and L. R. Sanders, Manager,) on abstracts and arguments on file and oral arguments of counsel for both sides. And on May 12th, 1914, the Court filed their written opinion reversing and remanding the judgment of the District Court, a copy of which is hereto attached.

2 *Transcript.*

In the Supreme Court of Iowa.

29785.

STATE OF IOWA, Appellant,

v.

HUTCHINSON ICE CREAM Co. and C. J. HUTCHINSON, Manager,  
Appellees.

George Cosson, Attorney General.

John Fletcher, Ass't Att'y Gen.

Hager & Parrish.

Appealed from Polk District Court.

*Papers Filed by Appellant.*

1914.

Jan. 12. Abst.

Jan. 12. Motion to Advance (sustained).

Jan. 20. Reply to Resistance.

Mar. 2. Argument.

Mar. 24. Notice of Oral Argument by both sides.

Mar. 25. Exhibits.

Apr. 4. Argument.

Apr. 8. Reply.

Apr. 9. Reply.

*Papers Filed by Appellee.*

1914.

Jan. 19. Resistance to Motion to Advance.

Mar. 25. Argument.

Apr. 3. Argument.

*On Rehearing.*

June 2nd, 1914. Notice of Rehearing.

July 14, 1914. Waiver of Rehearing.

Opinion filed May 12th, 1914.

Disposition of: Reversed and remanded.

3 Filed Jan. 12, 1914. B. W. Garrett, Clerk Supreme Court.

In the Supreme Court of Iowa, January Term, 1914.

STATE OF IOWA, Appellant,

vs.

HUTCHINSON ICE CREAM COMPANY, and C. J. HUTCHINSON,  
Manager, Appellees.

Criminal.

Appeal from Polk District Court.

Hon. W. H. McHenry, Judge.

Thos. J. Guthrie, County Attorney, and George A. Wilson, As-  
sistant County Attorney, Attorneys for Appellant.

Hager &amp; Parrish, Attorneys for Appellee.

*Appellant's Abstract.*Due, timely and legal service of the within abstract is accepted  
this — day of January, 1914.\_\_\_\_\_,  
\_\_\_\_\_,  
*Attorneys for Appellees.*4 On the 29th day of July, 1913, there was filed in the office  
of John T. Conroy, Justice of the Peace in and for Des  
Moines Township, an information entitled the State of Iowa vs.  
Hutchinson Ice Cream Company and C. J. Hutchinson, Manager,  
the same being as follows:Defendants are accused of the crime of selling, exchanging, deliver-  
ing and having in possession with intent to sell, exchange and expose  
and offer for sale and exchange adulterated food, in violation of  
Chapter One Hundred and Sixty-six (166), laws of the Thirty-first  
General Assembly, as amended; Supplement to the Code, Section  
4999-a15 to 4999-a43.

For that defendants did on or about the 21st day of July, A. D. 1913, in the Town of Des Moines, County of Polk and State of Iowa, have in possession with intent to sell, exchange and expose, and offer for sale and exchange, and did sell, exchange and deliver to one P. W. Crowley, a certain food product called "Ice Cream" which was adulterated in that it did not conform to the standards established by law, being deficient in butter fat.

The same being adulterated contrary to the statute in such cases made and provided and against the peace and dignity of the State of Iowa.

(Signed)

W. B. BARNEY,  
*State Food and Dairy Commissioner.*

5 Thereafter the defendant filed a

*Demurrer,*

the same being as follows:

Come defendants and demur to the information herein because:

First. The acts charged as constituting the offense charged, constitute no crime under the statutes upon which the prosecution is based, i. e., Chapter 166, Laws of the Thirty-first General Assembly, Sec. 4999-a15 to 4999-a43.

Second. If the prosecution is claimed to be based in any respect upon the provisions of Chapter 175, Acts of the Thirty-fourth General Assembly, said act of the Thirty-fourth General Assembly is unconstitutional and void in view of Sec. 29, Article 3, of the Constitution of Iowa, which provides that every act shall embrace but one subject which shall be expressed in its title, moreover said act provides no penalty and being a separate act is not included within the prohibition of Sec. 4999-a15-a43 Supplement to Code.

Third. The legislature had no power to fix the standard of butter fat in ice cream at 12 per cent because:

a. Said standard and the statute fixing the same are unreasonable.

b. It invades the individual rights of defendant and is not a mere police regulation having no relation in fact to the comfort, safety and welfare of the public.

6 c. Said statute is in violation of Sec. —, Article — of the Constitution of the State of Iowa, in that it arbitrarily interferes with personal liberal and private property without due process of law, having in fact no relation to the public health, comfort or welfare.

d. That said statute is in violation of Section 1, Fourteenth Amendment to the Constitution of the United States in that it arbitrarily interferes with personal liberty and private property without due process of law having in fact no relation to the public health, comfort or welfare.

(Signed)

HAGER & PARRISH,  
*Attorneys for Defendant.*

And on the 16th day of September, 1913, the said John T. Conroy, Justice of the Peace, overruled said demurrer and thereafter upon a hearing of the evidence in said case, defendants having entered a plea of not guilty, the court after hearing all the evidence offered and introduced found the defendant guilty, and they were thereupon assessed a fine in the sum of \$50.00, and judgment was entered for that amount.

Thereafter, to-wit: on the 16th day of September, 1913, the defendant filed its Notice of Appeal to the District Court of Polk County, Iowa.

That thereafter, to-wit: December 18, 1913, said cause coming on for hearing in the district court, the defendants' demurrer

7 being again interposed was thereupon argued to the court, the Honorable W. H. McHenry, Judge, presiding.

And on the 19th day of December, 1913, said court sustained said demurrer and filed with the clerk of the District Court of Polk County, Iowa, the following

#### *Ruling and Judgment.*

The defendants are accused in two separate informations of exchanging, delivering and having in possession with intent to sell, exchange, expose and offer for sale, adulterated food in violation of Chapter 166 of the Laws of the Thirty-first General Assembly as amended, for that the defendants did on or about the 21st day of July, 1913, at the Town of Des Moines, Polk county, Iowa, have in their possession with intent to sell, exchange and expose and offer for sale and exchange a certain food product called ice cream which was adulterated in that it did not conform to the standard established by law, being deficient in butter fat.

The statutes of this state are Supplement to the Code, Section 4999-a-22, Subdivision 4, defining adulteration of food which provides that any food that does not conform to the standing established by law is adulterated food. And Section 4999-a-20 of the Supplement to the Code, which provides a penalty for selling a food product which does not conform to the said standard established by law, and Chapter 175 of the Thirty-fourth General Assembly which is an act to amend Section 4999 of the code relating to food standards

8 by which it is enacted as follows: "Section I. Ice cream is the frozen product made from pure, wholesome sweet cream and sugar with or without flavoring, and if desired the addition of not to exceed 1 per cent by weight of a harmless thickener, and contains not less than 12 per cent by weight of milk fat and the acidity shall not exceed three-tenths of 1 per cent."

The defendants have demurred to these informations upon the ground that the act is unconstitutional for the reason that but one subject shall be expressed in the title of an act, and that the title of the act in question does not express the purpose of this amendment. Also that the legislature has no power to fix the standard of butter fat in ice cream at 12 per cent; because the standard is unreasonable, and because it invades the individual right of the defendant, and is

not a police regulation, having no relation in fact to the comfort, health or welfare of the public. And further because the statute is in violation of Sections 1 and 9 of Article I of the Constitution of the State of Iowa in that it arbitrarily interferes with personal liberty and private property without due process of law. And further that the statute is in violation of Section 1 of the 14th Amendment of the Constitution of the United States in that it arbitrarily interferes with personal liberty and private property without due process of law, having in fact no relation whatever to public health, comfort, morals or safety.

This question presented in this manner requires of this court to determine the constitutionality of this law. Realizing that it is not the province of the court to declare an act of the legislature unconstitutional upon any trifling ground, or upon mere prejudice or feeling; that the court should not declare an act unconstitutional unless the act violates the fundamental law beyond any reasonable doubt, this court hesitates to act upon this question without expressing the reasons for such action.

Both the Constitution of the United States and of the State of Iowa, provide that "No man shall be deprived of his liberty without due process of law." The meaning of the term liberty has been construed by many of the courts to mean the highest degree of freedom of individual action consistent with public welfare and the legal rights of other individuals. The police power of the state is sufficient to authorize the control of any citizen in his property rights, his contractual relations and his private conduct if they are enacted for, and applicable to, the public welfare, health, morals or comfort. The right to establish and conduct an ordinary and legitimate business, and to enter into contracts and to pursue a calling cannot be interfered with unless there is a tendency to injure public health, comfort or morals. And so long as the legislative power is exercised for the furtherance of these principles of government it cannot be interfered with by the court. But whenever the legislature, under the pretense of regulating the public health, comfort or morals; in other words, under the pretended exercise of the police power of the state, attempts to control and regulate the citizen in the exercise of his natural and legal rights when such control has no relation whatever to public health, comfort or morals, the actions of the legislature are void and of no effect, because they are in conflict with the fundamental law of the land. I do not need to cite authorities to establish these principles which are so well established and so firmly rooted in the jurisprudence of the nation that they need no further citation. The question then is as follows: Can the legislature of the State of Iowa prescribe by law that the manufactured products known to the public as ice cream shall contain 12 per cent by weight of butter fat? In construing all these statutes it is the duty of the court to take into consideration by the process known as judicial notice all those matters and things which are of common knowledge and understanding.

Butter fat is the natural product which is extracted from cream or milk and as a food product is generally known and recognized

as a harmless food product and suitable for the maintenance and support of the physical bodies of men. Yet it is equally well known and commonly understood that a food product without butter fat may be equally harmless or equally beneficial. Ice cream is not a natural food product, but a manufactured combination of other ingredients. To one man ice cream containing 12 per cent of butter fat might be beneficial and acceptable to his taste. To another man ice cream containing but 6 per cent of butter fat might be more suitable, and in both cases it is a matter of common knowledge that it is a harmless food product not injurious to public health, morals and welfare. The State of Iowa might as well have said in defining ice cream that it shall have 10 per cent by actual weight of sugar. The facts upon which this law is founded are simply arbitrary, and the presence of 12 per cent of butter fat in ice cream has no relation whatever, and cannot possibly have any relation to public health, morals or welfare.

- 11 If the legislature of the State of Iowa can say to the manufacturer you cannot sell ice cream within the State of Iowa, unless it contains 12 per cent of butter fat, the same prohibition extends to the consumer and prevents him from buying and consuming ice cream with a less percentage than 12 of butter fat. The law not only interferes with the liberty of the manufacturer, but interferes with the liberty of the consumer who may, by reason of his personal taste and desires, prefer ice cream of a lower percentage of butter fat.

While there has never been a decision of any of the courts that I have been able to find determining these propositions of law as applied to ice cream, yet they have been repeatedly announced by the highest courts of the land. And if the State of Iowa through its legislature has prescribed the ingredients of pure food which will remain pure food with or without the ingredients prescribed by statute and harmless to public health, morals or comfort with or without the prescribed ingredients they have invaded the personal liberty of the citizen and their action is void. If the legislature of Iowa can prescribe that ice cream shall contain 12 per cent of butter fat and prevent the sale of it without that ingredient they may equally provide that no baker shall sell cake unless it contains 20 per cent by actual weight of pure eggs to the pound of cake. They may also provide that no hotel keeper shall serve soup to his customers without 6 per cent of animal fat therein, and both the manufacturer and the purchaser would be bound by this act of the legislative body.

- 12 A further discussion of this question which is so plainly and unequivocally beyond the power of the legislative body would be useless.

The conclusion of the court is that the statute in question is unconstitutional because it violates both the Constitution of the State of Iowa and the United States of America.

The demurrer in each case is therefore sustained and defendants ordered discharged and their bonds released.



THE STATE OF IOWA.

And thereafter and on the 18th day of December, 1913, the following was entered of record:

*Judgment.*

Now on this day, this case comes on for hearing upon the demurrer of defendant to the information filed in said cause, the State of Iowa appearing by Thos. J. Guthrie, County Attorney, and the court after being fully advised in the premises sustains said demurrer, and plaintiff excepts.

It is therefore ordered and adjudged by the court that this cause be and the same is hereby dismissed, the defendant discharged and bond released.

(Signed)

W. H. McHENRY, *Judge.*

December 18, 1913.

And thereupon the plaintiff, the State of Iowa, served upon Hager & Parrish, attorneys for the defendant, and Joseph P. Maher, Clerk of the District Court of Polk County, Iowa, its

13 & 14

*Notice of Appeal.*

On the 22d day of December, 1913, the appellant perfected its appeal to the Supreme Court of the State of Iowa by serving the same on Hager & Parrish, the attorneys for the defendants, and on Joseph P. Maher, Clerk of the District Court of Polk County, Iowa, appealing from the ruling on the demurrer, and filing the said notice of appeal with the said clerk, and securing to the said clerk his fees for a transcript of the proceedings.

*Certificate of Attorneys.*

The above and foregoing abstract of record in the above entitled cause contains all the records therein, pleadings and evidence introduced on the trial, rulings of the court, and all proceedings had and done in said case, and are as full, true and complete as the same are on file in the record of the clerk of the District Court of Polk County, Iowa.

THOS. J. GUTHRIE,  
*County Attorney, and*  
GEORGE A. WILSON,  
*Ass't County Attorney,*  
*Attorneys for Appellant.*

15

In the Supreme Court of Iowa.

Filed May 12, 1914.

(Full Bench Case.)

29784—29785.

STATE OF IOWA, Appellant,

VS.

HUTCHINSON ICE CREAM COMPANY, and C. J. HUTCHINSON, Manager, Appellees, and Another Case.

Appeal from Polk District Court.

Hon. W. H. McHenry, Judge.

Two informations were filed by a State Food and Dairy Commissioner before a Justice of the Peace in two cases, one against the Hutchinson Ice Cream Company and C. J. Hutchinson, Manager, and the other against the Sanders Ice Cream Company and E. R. Sanders, President.

The defendants were accused of the crime of selling, exchanging, delivering, and having in possession with intent to sell, exchange and expose and offer for sale and exchange, adulterated food, in violation of Chapter 166, Laws of the 31st G. A., as amended; Supp. to the Code, Sec. 4999-a15 to 4999-a43, for that the defendants did have in possession, with intent to sell, exchange and expose and offer for sale and exchange and did sell, exchange and deliver a certain food product called ice cream, which was adulterated, in that it did not conform to the standards established by law, being deficient in butter fat, etc.

Demurrers were interposed by the defendants on the following grounds:

First. The acts charged as constituting the offense charged, constitute no crime under the statutes upon which the prosecution is based, i. e., Chapter 166, Laws of the Thirty-first General Assembly, Sec. 4999-a15 to 4999-a43.

Second. If the prosecution is claimed to be based in any respect upon the provisions of Chapter 175, Acts of the Thirty-fourth General Assembly, said act of the Thirty-fourth General Assembly is unconstitutional and void in view of Sec. 29, Article 3, of the Constitution of Iowa, which provides that every act shall embrace but one subject which shall be expressed in its title, moreover said act provides no penalty and being a separate act is not included within the prohibition of Sec. 4999-a15-a43 Supplement to Code.

Third. The legislature had no power to fix the standard of butter fat in ice cream at 12 per cent because:

a. Said standard and the statute fixing the same are unreasonable.



b. It invades the individual rights of defendant and is not a mere police regulation having no relation in fact to the comfort, safety and welfare of the public.

c. Said statute is in violation of Sec. — Article — of the constitution of the State of Iowa, in that it arbitrarily interferes with personal liberty and private property without due process of law, having in fact no relation to the public health, comfort or welfare.

d. That said statute is in violation of Section 1, Fourteenth Amendment to the Constitution of the United States in that it arbitrarily interferes with personal liberty and private property without due process of law having in fact no relation to the public health, comfort or welfare.

The demurrers were overruled by the Justice, evidence was taken, and the defendants were found guilty. An appeal was taken to the District Court, where the demurrers were again interposed and sustained. The State appeals. The cases are submitted together. Reversed.

Geo. Cosson, Attorney General; John Fletcher, Asst. Atty. Gen.; O. S. Thomas, Special Counsel; Thomas J. Guthrie, County Atty., and George A. Wilson, Assistant County Atty., for the Appellant.

Hager & Parrish and Walter Jeffreys Carlin for Appellees.

PRESTON, J.:

1. One of the objections to the statute on which this prosecution is based is that the act is invalid for non-compliance with Sec. 29, Article 3, of the Constitution of Iowa, in that its subject was not expressed in the title. This constitutional provision, or that part of it relating to the points raised in this case, is that, "Every act shall embrace but one subject, and matters properly connected therewith; which subject shall be expressed in the title."

Chapter 166, Acts of the 31st G. A. (Code Supp. Sec. 4999-a15 to a30) was an act to prevent the adulteration of foods, etc. This was amended by Chapter 178, Acts of the 32nd G. A., by adding at the end of Chapter 166, as Section 18, and now appearing as 4999-a31 of the Supplement to the Code, relating to food standards, and establishes standards for certain articles therein enumerated.

That section (4999-a31) was amended by Chapter 175 of the 34th Session of the Legislature, the act in question, and fixes a standard for ice cream in addition to the other articles for which the standard had been fixed in 4999-a31. The title to Chapter 175, just referred to, is,

"An Act to amend section four thousand nine hundred and ninety-nine-~~athirty~~-one (4999-31) of the supplement to the code, 1907, relating to food standards."

The provisions of the act establishing an ice cream standard, after the enacting clause, are:

"1. Ice-cream. Ice-cream is the frozen product made from pure wholesome sweet cream, and sugar, with or without flavoring, and if desired, the addition of not to exceed one per cent. (1%) by weight of a harmless thickener, and contains not

less than twelve per cent. (12%) by weight of milk fat, and the acidity shall not exceed three-tenths (3-10) of one per cent. (1%).

"2. Fruit ice-cream. Fruit ice-cream is the frozen product made from pure wholesome sweet cream, sugar, and sound, clean, mature fruits, and, if desired, the addition of not to exceed one per cent. (1%) by weight of a harmless thickener and contains not less than ten per cent. (10%) by weight of milk fat.

"3. Nut ice-cream. Nut ice-cream is the frozen product made from pure wholesome, sweet cream, sugar, and sound, non-rancid, nuts, and, if desired, the addition of not to exceed one per cent (1%) by weight of harmless thickener, and contains not less than ten per cent (10%) by weight of milk fat."

Some of the other provisions of these statutes, which have some bearing upon the points argued will be here referred to. Section 4999-a20 provides in part that:

"No person, firm or corporation, by himself, officer, servant or agent, or as the officer, servant, or agent of any other person, firm or corporation, shall manufacture or introduce into the state, or solicit or take orders for delivery, or sell, exchange, deliver or have in his possession with the intent to sell, exchange or expose or offer for sale or exchange, any article of food which is adulterated or misbranded, within the meaning of this act."

Section 4999-a21 provides in part:

"The word 'food,' as herein used, shall include all articles used for food, drink, confectionery or condiment, \* \* \* by man or domestic animals, whether simple, mixed or compound."

19 Section 4999-a22 defines adulteration and states in part that:

"For the purpose of this act an article of food shall be deemed to be adulterated:

"First. If any substance or substances has or have been mixed and packed with it so as to reduce or lower or injuriously affect its quality, strength or purity.

"Second. If any substance or substances has or have been substituted wholly or in part for the article.

"Third. If any valuable constituent of the article has been wholly or in part abstracted.

"Fourth. If it be an imitation of; or offered for sale, under the specific name of another article, or if it does not conform to the standards established by law."

The purpose of the constitutional provision contained in Sec. 29, Art. 3, was, as stated in some of the cases, to prohibit the insertion in an action, of incongruous matter having no connection or relation with the general subject as expressed in the title. It has been held that the title is sufficient, although confined to general terms, if it answers as a key to the subject matter of the act.

Sisson vs. Board, 128 Iowa, 442, 452.

State vs. Fairmont Creamery Co., 153 Iowa, 702, 715.

It is not necessary that the details of the subject matter, or reasons which brought about the enactment by the Legislature should be

set out in the title. If it refers in a general way to the subject and is reasonably germane, and calculated to advise the members of the Legislature, and the people, of the nature of the pending legislation, or changes in the laws by amendment, it is sufficient. The requirement that the act shall embrace but one subject, and matters properly connected therewith, was intended to prevent the evils

20 of omnibus bills and surreptitious legislation. It is not claimed in this case that the act in question does contain more than one subject, but that the subject is not expressed in the title. This, of course, must be done, under the terms of the provision, at least to the extent already indicated. The authorities seem to agree that such provisions are to be given a reasonable construction. As some of them state it, they should be construed liberally to uphold proper legislation, all parts of which are reasonably germane, on the one hand, and to prevent trickery on the other.

Appellees rely on *State vs. Bristow*, 131 Iowa 664. In the *Fairmont Creamery* case, *supra*, it was shown that in the *Bristow* case there was nothing in the title to indicate the contents of the act; that the title related only to the act which was repealed, and did not refer to the act which was a substitute for the act which was repealed. Sec. 4999-a31 established standards of more than twenty articles. The essential subject was food standards. The act in question is amendatory to Sec. 4999-a31, and the title recites that it is "An Act relating to food standards."

The act in question adds ice cream to the list for which standards had already been established. In our opinion, it was germane, and the act does not offend against the constitutional provision quoted. The point is ruled by the holding in *McGuire vs. Railway*, 131 Iowa, 340, 346, and the *Fairmont Creamery Company* case, *supra*. See also:

*Santo vs. State*, 2 Iowa 165.

*State vs. County Judge*, 2 Iowa, 280.

*Morford vs. Unger*, 8 Iowa, 2.

*Davis vs. Woolnough*, 9 Iowa 104.

21 *Porter vs. Thomas*, 22 Iowa, 391.

*Martin vs. Blattner*, 68 Iowa, 286.

*Christie vs. Ins. Co.*, 82 Iowa, 360.

*Iowa Association vs. Selby*, 111 Iowa 402.

2. The principal point in the case is, whether the act in question, fixing a standard for ice cream, is within the police power of the State. The contention of defendants, as they state it, is substantially, that the act is not within the police powers of the State, for that it in fact has no relation to the comfort, health and welfare of the public, and hence violates both the State and Federal Constitution by interfering with the personal liberty and private property of the citizens, without due process of law; that it is arbitrary, unreasonable and an unwarranted interference with a lawful business, depriving manufacturers of ice cream of property rights of great value, and depriving both manufacturers of ice cream and the people of their liberty.

The contention of the State is, in substance, that the act is clearly within the police power of the State, and hence does not offend against the Federal or State Constitution, unless it has no reasonable relation to the purposes which it is designed to effect. It is conceded by the State that, to be a valid exercise of such power, the act must have relation to the comfort safety or welfare of the public, but that the welfare of the public involves or includes the right of the legislature to protect the public from fraud and deception; that the Constitution does not secure to any one the privilege of defrauding the public; that it is impossible for consumers of ice cream to determine by any ordinary diligence the ingredients of the product, and that, without a standard, opportunity is afforded unscrupulous  
 22 manufacturers of ice cream to palm off upon the public a much cheaper and inferior article for a higher quality at the price of the better and most costly product.

There seems to be no serious controversy between counsel for either side, in regard to any of the fundamental propositions of law, involved, but they agree that the difficulty lies in their application. Defendants concede the validity of the police power in its fullest extent; admit that it is within the power of the Legislature to enact laws for the purpose of preventing fraud in the sale of food products; that ordinarily the propriety of passing an act of this character is a question for the determination of the Legislature; that there are many restraints to which every person is necessarily subject for the common good, and that laws enacted under the police power to promote such purpose may be sustained, although they interfere, to some extent, with the liberty of the citizen and the freedom of contract. On the other hand, it is conceded by the State that such laws, to be valid, and within the police power, must not be arbitrary or capricious, but reasonable and have a reasonable relation to the object to be accomplished.

Such concessions render it unnecessary for us to discuss at length some of the points, or to review the many cases cited. It is said by counsel for appellees that the only debatable ground in the case is, whether this statute comes within the police power as a measure tending to prevent the liability to fraud and deception; that this is the real question. The wisdom or expediency of such a measure is not for the determination of the court. The presumptions are in favor of the exercise of the power in the enactment. We are to overthrow the Act, if at all, only when it violates the Constitution

23 "clearly, palpably, plainly and in such manner as to leave no reasonable doubt." The question is, whether there is any reasonable ground upon which the Legislature, acting within its conceded powers, could pass such a law as that now in question. The courts have not attempted to accurately define the limit of the police power. (?) nor is it advisable to do so, because of changing conditions. The power is broad, but subordinate to the Constitution. The courts may and will interfere in a proper case where the Legislature has clearly exceeded the constitutional limitations. It is not enough that the case is a doubtful one. Though we might be of the opinion that an 8% or some other standard should

have been established, still we ought not to interfere with the standard fixed by the Legislature, unless such standard is clearly arbitrary and unreasonable. We shall not take the space to give definitions of police power. The question is discussed at length in the following, among other, of our own cases:

McGuire vs. Railway, 131 Iowa, 340, 354.

State vs. Schlenker, 112 Iowa 642.

State vs. Packing Co., 124 Iowa 323.

It is not claimed by either side, as we understand it, that the act in question is a health law. The claim of the State is, that the purpose of the Legislature was to prevent the perpetration of fraud upon the public. The public welfare embraces a variety of interest-calling for public care and control; these are: the primary social interests of safety, order and morals; economic interests, and non-material and political interests.

Freund Police Power, Secs. 9, 15.

The claim here is that the act fixing a standard for ice cream deals with economic interests, the purpose being, as already  
24 stated, to prevent fraud. It was said in one of the milk cases, State vs. Schlenker, 112 Iowa 642;

"It is not enough to show that defendant did not intend to defraud, or that the milk he sold was wholesome. \* \* \* It is enough that adulteration such as prescribed by the statute may defraud, or prove deleterious to the public health or comfort. The Legislature may well determine that the adulteration of milk tends to facilitate vicious practices and that it ought to be prohibited."

Laws tending to prevent fraud and to require honest weights and measures in the transaction of business have been frequently sustained in the courts.

McClain vs. Arkansas, 211 U. S. 539, 550.

The Constitution does not secure to any one the privilege of defrauding the public.

Plumloy vs. Mass., 155 U. S. 461, 479.

As bearing upon the question as to whether this statute, fixing a certain standard for ice cream, is so manifestly arbitrary and unreasonable as that the Legislature was not justified, under the police power, in enacting it, and whether fraud might have been practiced upon the public in the sale of ice cream, we should here refer to conditions and some of the facts which we ought to presume were known to the Legislature when the statute was enacted. We say this because some of the facts and conditions called to our attention existed and were of more or less notoriety at the time of the passage of this law. We are asked to consider these facts and conditions for the purpose of determining whether the act is so manifestly arbitrary and unreasonable as to require us to hold it invalid. If, under  
25 any possible state of facts, the act would be constitutional and valid, the court is bound to presume that such conditions existed; whether a state of facts existed which called for the



enactment of this legislation was for the determination of the Legislature.

McGuire vs. Railway, *supra*.

An authority is cited to the effect that when a question of fact is debated, or debatable, and the extent to which a constitutional limitation goes is affected by the truth in respect to that fact, the court will take judicial cognizance of all matters of general knowledge, and will consider expressions of opinion from other than judicial sources given by those qualified by their skill and experience to express such opinions.

Muller vs. Oregon, 208 U. S., 412.

Just how far we should go in regard to such matters, where as in this case, the decision was on demurrer, we need not determine, for the reason that we are asked by both sides, without objection from either, to consider depositions taken for use, had the case been tried on the merits, reports, trade journals, cook books containing a great many formulas for making ice cream, circulars and the like. These have been abstracted and certified. We shall not attempt to set out all these matters, but enough to illustrate in a general way the points made.

It appears that in seventeen states the standard fixed for ice cream to be sold is 14%; five states have fixed the standard at 12% butter fat, the same as our own; but five states which have legislated have a lower standard than Iowa; the Federal Government fixes the standard for ice cream at 14%. It should be said as to the 14% standard fixed by the Federal Government that it is not claimed that such standard has been fixed by law, but by the United States Department of Agriculture. But, even though not law, it would  
26 be a circumstance proper to be considered as the opinion of that department. The Legislature would not be bound entirely by the conflicting opinions of any of the persons we shall refer to. From these documents, it appears that there is a difference of opinion as to the advisability of establishing a standard for ice cream, or if it is established, the percent of butter fat the product should contain. Some think a high standard of butter fat is injurious to health, especially for children and invalids; others object to high butter fat contents during the summer months on account of the shortage in the supply. It is contended by some that ice cream should be made from cream, sugar and flavor solely. An article in a trade journal says:

"Commissioners have agitated a high butter fat standard and we have the significant controverting fact that nowhere is there a great ice cream business built up on a high butter fat formula. The ice cream manufacturers know what the public wants. It does not want an over rich product because it cannot eat enough of it."

The same article states:

"The moral support of the dairyman, the creamery men and the cheese manufacturer and the milk dealer in these matters will help greatly. They have only to remember that when the ice cream man cuts his butter fat content, he adds condensed — and that is about

as valuable as the other, i fanything condensed is more valuable because it allows the use of all the milk."

Large manufacturers of ice cream from different parts of the country gave testimony and gave their opinions from their standpoint. They state that they would not attempt to define ice cream because it covers a large number of frozen substances.

27 That there is an unlimited number of formulas; cream should be a part of the mix, the same as sugar or flavor. When condensed milk is used the purpose is to add solids, thereby giving the cream better body; the purpose of the cream is to add to the flavor and to add to the body; the largest dealers in the United States are not so-called high butter fat men; butter fat is not the best solid to provide body for ice cream; these are manufacturers who make a high butter fat ice cream and cater only to exclusive trade and get a long price for it. One witness says:

"Speaking in a commercial sense, I do not believe raising the standard to 12% would materially affect the price of ice cream. It would diminish the amount of other solids which would be put in it; the milk producer's skim milk would go to waste. The use of condensed milk has very much increased during the last few years because of the increased demand for ice cream and the extensive use of mild solids in ice cream. Millions of gallons of skim milk used to be thrown away which is now converted into condensed milk and there is a ready market for it. My experience is that the public prefers 8% ice cream to 12%. The 8% standard was arrived at in Illinois by a commission which investigated the matter and arrived at the standard of 8%. I do not think there should be any standard at all."

Other witnesses gave similar testimony. One manufacturer of many years' experience says that years ago ice cream would test so low in butter fat that you would not know how to find it; that it was then made out of milk, eggs, and corn starch, but that later, "We enlarged the butter fat in it." He says that the man who makes high butter fat ice cream will have to demand more money for it; that normal butter fat ice cream runs from 6% to 10%; that

28 the per cent of butter fat has no relation to its wholesomeness. Defendants show that consumers would eat a less quantity of ice cream which is rich in butter fat. This would decrease the consumption by the public, and the output and profits of the manufacturers. This would not, perhaps, be a reason for fixing a standard, but may bear on the motive of those who oppose it and affect their claims as to whether the standard is unreasonable. As stated, there are many formulas for making ice cream. Here is one:—

*"Vanilla Ice Cream Without Cream or Milk."*

One vanilla bean, 8 gills of syrup at 20 degrees, 18 egg yolks.  
(To be cooked and frozen.) Then work in a maringue made of 2 egg whites and  $\frac{1}{4}$  lb. of sugar."

It is shown that the cost to manufacture ice cream containing 20% butter fat is 45 cents per gallon; containing 7.7%, 29 cents;

and that where condensed milk is used and the product contains 1.9% butter fat the cost is about 15½ cents per gallon.

We have set out these matters somewhat in detail for the purpose of showing that the consumer may be defrauded, and as showing the propriety or necessity for fixing a standard, or rather to show that the Legislature might properly so determine. We quote at some length from one of the documents submitted:

"Ice cream is one of the delights of the food adulterator, for ice cream is a mixture of various things in which each one more or less loses its identity. The adulterator is able therefore to inject all manner of inferior and often dangerous cheapeners into his product and to compete successfully with the honest manufacturer who makes clean, wholesome ice cream.

"The honest ice cream maker today is working at a decided disadvantage when he is obliged to compete with the dishonest one, since the dishonest one need not label his product so that the ingredients will be shown to the consumer or even to the retailer. This fact was strikingly shown at a recent meeting of ice cream manufacturers in New York, at which one man present declared that it was impossible for a competitive ice cream maker to be honest.

"This man asserted, and with much reason, that there were three things that made manufacturers dishonest. These three things were the federal government and the state and municipal departments of health, all of which encourage the dishonest manufacturer at the expense of the honest one. As a basis of his argument this man presented three formulas for making commercial ice cream which speak for themselves. Here they are:

#### *Formula No. 1.*

Sells to retailer at \$1.25 per gallon.

11 quarts 40% of cream at 45c.....	\$4.95
5 quarts grade B milk at 6½c.....	.33
4 quarts condensed milk at 20c.....	.80
9 pounds sugar.....	.45
4 ounces extract.....	.40
	<hr/>
	\$6.93

"When expanded by freezing this quantity of ingredients produces forty quarts of ice cream, containing 20% butter fat at a cost of less than 80¢ per gallon.

#### *Formula No. 2.*

Sells to retailers at 90¢ per gallon.

3 quarts 40% cream at 45c.....	\$1.35
13 quarts grade B milk at 6½c.....	.85
4 quarts condensed milk at 20c.....	.80
4 ounces gelatine at 24¢ per lb.....	.06
4 ounces extract.....	.40
7½ pounds sugar.....	.38
	<hr/>
	\$3.84



30 "These ingredients expanded by freezing yield forty quarts of ice cream containing  $7\frac{1}{2}\%$  butter fat at a cost of 38¢ a gallon.

*Formula No. 3.*

10 gallons of condensed milk.....	\$8.00
10 gallons grade B milk.....	2.60
60 gallons plain water.....	0.00
4 pounds gelatine at 20c.....	.80
Color.....	.01
Flavor.....	1.00
60 pounds sugar at 5c.....	3.00
	<hr/>
	\$15.41

"These ingredients expanded by freezing yield 120 gallons of 'ice cream' at a cost of 13 cents a gallon.

"What the ice cream makers, and consumers as well, need is the creation of ice cream standards and laws which would compel the manufacturers who make 'cheap' ice cream to correctly label their product. A law is needed in New York and other places which will state how much butter fat must be contained in ice cream before it can be called ice cream, and which will prevent the use of gelatine reeking with millions of bacteria and of coal tar dyes, unless these ingredients are labeled.

"Ice cream is a commercially manufactured commodity, and as such should be adequately regulated by the health authorities, both for the benefit of the honest manufacturers and the innocent consumers."

Notwithstanding these conflicting opinions, it was a question for the Legislature to say whether this legislation was called for. The Legislature was not compelled to take the view of either those who favor or oppose a standard. Taking one view of it, conditions were such as to clearly sustain the action of the Legislature. We are not entirely satisfied that this would not be so if conditions were as claimed by the defendants. We are not to say, and do not, of course, determine that these defendants, or the association appearing in argument, or any particular person is or has been guilty of any fraud or deception. The question is whether, without a standard, dishonest or unscrupulous manufacturers may do so. It is not practicable by any ordinary inspection for the purchaser to distinguish cheaper, low grade, ice cream from the better quality. Because of this, it is apparent from the matters which we have detailed that an opportunity is afforded for deception by selling an inferior quality of ice cream at the price of a better or more expensive grade. This was the case in the sale of oleomargarine.

State vs. Packing Co., 124 Iowa 323.

In this respect it differs from the case of Frost vs. Chicago 178 Ill., 250, where it was held that a person who is ordinarily careful

and intelligent could not be deceived by a netting covering for baskets of fruit. In such case the purchaser could still see and know what he was buying.

The purpose of the act in question was to prevent just such deception and fraud as would be possible without a standard and it seems to us it cannot be seriously claimed that the statute will not accomplish the end sought.

It is said by defendants that they are deprived of the right to sell their product if it contains a less per cent of butter fat than that prescribed by the statute and that the sale of such is entirely prohibited. This, we think is an assumption not warranted. They may sell it for what it really is. Possibly it would sell as readily if it is named and sold as frozen skim milk, if not, this would be an additional argument for prohibiting the sale of so-called ice cream made from evaporated skim milk as ice cream.

32 The State contends that every point in this case is decided against the contentions of defendants in *State vs. Schlenker*, supra, and *State vs. Snow*, 81 Iowa 642. They are very closely in point.

The only case called to our attention in which the question of fixing a standard for ice cream was decided is *Bigbers vs. City of Atlanta*, 66 S. E., 991. In that case, under an ordinance, the prohibition was not against selling ice cream of less than the prescribed percentage, as ice cream, but against selling it at all. The provision of the ordinance is:

"Ice cream sold or kept for sale must contain at least 10% butter fats, for fruit ice cream, and 12% for plain ice cream."

Under this ordinance, ice cream could not be sold or kept for sale unless it contained the required per cent of butter fat. As already stated, our statute does not prohibit the sale of such product. In the *Georgia* case, the court said:

"It might be permissible to say that the term 'ice cream' \* \* \* should relate only to ice cream of a certain prescribed richness, and that whoever sold ice cream of poorer quality should either by calling it under some other name, or by indicating on the vessel in which it is delivered, or otherwise, disclose the inferiority of its quality."

Thus recognizing the distinction which we make between that ordinance and our statute, and holding that the sale of ice cream may be regulated by fixing a standard. Our statute fixes a standard for ice cream and prohibits the sale of anything else as ice cream, but the sale of a product formerly known as ice cream, but containing a lower per cent of fat than that prescribed by the statute, is not prohibited. It may be sold for what it is. It may be sold under some other name and the consumer will not be deceived for he now knows that when he buys ice cream he is getting an article containing a certain per cent of butter fat, and that this may not  
33 be so if he buys something not as ice cream but as something else.

Defendants say their case comes within the doctrine of *People vs. Marx*, 99 N. Y., 377. This must be on the erroneous assumption

that the Iowa Statute prohibits absolutely the sale of their product if it contains less than the specified per cent of fat. The New York statute referred to in the Marx case did prohibit the sale of oleomargarine, which was shown to be a wholesome article and not injurious, and the statute was held invalid. That statute was amended so as to regulate the sale and held valid in *People vs. Arensberg*, 105 N. Y., 128; 11 N. E. 277. As amended, the statute was entitled: "An Act to prevent deception in the sale of dairy products, etc."

It prohibited: (1) The manufacture out of any animal fat, or animal or vegetable oils not produced from unadulterated milk, or cream from the same, of any product in imitation or semblance or designed to take the place of any natural butter produced from milk, etc.; (2) Mixing, compounding with, or adding to milk, cream or butter, any acids or other deleterious substances, or animal fats, etc., with design or intent to produce any article in imitation or semblance of natural butter; (3) Selling, or keeping, or offering for sale, any article manufactured in violation of the provisions of the section.

The defendant was convicted of selling the article manufactured in violation of the provisions of the act. The court said:

"Assuming, as is claimed, that butter made from animal fat or oil is as wholesome, nutritious and suitable for food as dairy butter; that it is composed of the same elements and is substantially the same article, except as regards its origin; and that it is cheaper

and that it would be a violation of the constitutional rights 34 and liberties of the people to prohibit them from manufacturing or dealing in it for the mere purpose of protecting the producers of dairy butter against competition, yet it cannot be claimed that the producers of butter made from animal fats or oils have any constitutional right to resort to devices for the purpose of making their product resemble in appearance the more expensive article known as 'dairy butter', or that it is beyond the power of the Legislature to enact such laws as they may deem necessary to prevent the simulated article being put upon the market in such a form and manner as to be calculated to deceive. If it possesses the merits which are claimed for it, and is innocuous, those making and dealing in it should be protected in the enjoyment of liberty in those respects; but they may legally be required to sell it for and as what it actually is, and upon its own merits, and are not entitled to the benefit of any additional market value which may be imparted to it by resorting to artificial means to make it resemble dairy butter in appearance. It may be butter, but it is not butter made from cream, and the difference in cost or market value, if no other, would make it a fraud to pass off one article for the other."

In *Re Jacobs*, 98 N. Y. 98, is cited. In that case the statute purported to be an act to improve the public health by prohibiting the manufacture of cigars in tenement houses. It was held that it was not a health law; that cigar making had no relation to the health of the public and that the act was not intended to protect the health of the occupants of the tenement. In that case it was held, and the proposition is not disputed by the State, that the constitutional

guaranty that no person shall be deprived of his property without due process of law may be violated without physical taking of property for public or private use, and that any law which destroys it or its value, or takes away any of its essential attributes, deprives the owner of his property.

35 People vs. Biesecker, 169 N. Y. 53; 61 N. E. 990, is also cited. It was there held that the statute under consideration could not be justified as an exercise of power to prevent fraud or imposition on buyers and consumers.

We have referred to these New York cases more fully than necessary perhaps, but, because of the claim made for the Marx case, we have thought it proper to refer briefly to the others as well. The Marx case is cited and distinguished in State vs. Snow, 81 Iowa 642.

In Schmidinger vs. Chicago, 226 U. S. 578, 57 L. Ed., 364, it was held that a city ordinance fixing the weight of the standard loaf of bread to be sold in the city, and prohibiting the making or selling of loaves not up to the weight of the standard loaf is not such an unreasonable and arbitrary exercise of the police power as to render the ordinance void under the Constitution prohibiting the taking of property without due process. It was shown in that case that there was a considerable demand for loaves of different size, and that so fixing the size produced some inconvenience. The ordinance was sustained upon the theory that it tended to prevent fraud in the sale of bread. The court said:

"Furthermore, laws and ordinances of the character of the one under consideration and tending to prevent frauds and requiring honest weights and measures in the sale of articles of general consumption, have long been considered lawful exercise of the police power," and that "This court has had frequent occasion to declare that there is no absolute freedom of contract. The exercise of

36 the police power fixing weights and measures and standard sizes must necessarily limit the freedom of contract which would otherwise exist. Such limitations are constantly imposed upon the right to contract freely, because of restrictions upon that right deemed necessary in the interest of general welfare," and that "So long as such action has a reasonable relation to the exercise of the power belonging to the local legislative body and is not so arbitrary or capricious as to be a deprivation of due process of law, freedom of contract is not interfered with in a constitutional sense."

That the Legislatures of the states may, in the exercise of the police power, regulate a lawful business, see Barrett vs. Indiana, 229 U. S. 26; 57 L. Ed. 1050.

The following cases may be cited as bearing upon the proposition that the Legislature, under its police power, may enact laws for the purpose of preventing fraud in the sale of food products:

State vs. Campbell, 64 N. H. 402.

Board vs. Van Druens, 72 Atl., 125 (N. J.)

People vs. Bowen, 182 N. Y. 1.

Chicago vs. Bowman Dairy Co., 234 Ill., 294.

People vs. Worden Grocer Co., 118 Mich. 604.

State vs. Crescent Creamery Co., 54 L. R. A. 466 (Minn.)

All points raised by the demurrers have been noticed. We are of opinion that the statute is within the police power of the state and is not unreasonable. That it has a reasonable relation to the object to be effected and does not offend against either the Federal or State Constitution in any of the particulars mentioned. It follows that the court erred in sustaining the demurrers. Both cases are reversed and remanded.

Reversed and remanded.

The Justices all concur.

37

Draft.

*Authentication of Record.*

SUPREME COURT,

*State of Iowa, ss:*

I, B. W. Garrett, clerk of said court, do hereby certify that the foregoing pages, numbered from 1 to 36, inclusive, are a true, full and complete transcript of the record and proceedings, in the case of the Hutchinson Ice Cream Company, and C. J. Hutchinson, Manager, vs. The State of Iowa, and also of the opinion of the court rendered therein, as the same now appear on file in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said court at my office, in Des Moines, Iowa, this 14th day of July, 1914.

[Seal of the Supreme Court of Iowa.]

[SEAL.]

B. W. GARRETT,

*Clerk Supreme Court of Iowa.*

38

Supreme Court of Iowa.

No. 29784.

STATE OF IOWA, Appellant,  
against

HUTCHINSON ICE CREAM COMPANY and C. J. HUTCHINSON, Manager, Appellees.

*Assignments of Error.*

Now comes the above appellees and file herewith their petition for a writ of error, and say that there are errors in the records and proceedings of the above entitled case, and for the purpose of having the same reviewed in the U. S. Supreme Court make the following assignment:

The Supreme Court of Iowa erred in holding and deciding that Chapter 166, Laws of the 31st General Assembly Supplement to the Code, Section 4999-a 15 to Section 4999-a 43 of the Laws of the State of Iowa as amended by Chapter 175 of the Laws of the 34th General Assembly of the State of Iowa, were valid. The valid-



ity of such sections was denied and drawn in question by the defendants, appellees, on the ground of their being repugnant to the Constitution of the United States, and in contravention thereof.

The said errors are more particularly set forth as follows:

The Supreme Court of Iowa erred in holding and deciding:

First. That Chapter 175 of the Laws of the 34th General Assembly of the State of Iowa did not abridge the privileges and immunities of citizens or of these defendants-appellees, nor deprive them of liberty or property without due process of law, nor deny to them the equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Second. That Chapter 175 of the Laws of the 34th General Assembly of the State of Iowa did not abridge the privileges and immunities of the defendants nor deprive them of their liberty or property in prohibiting the sale of ice cream under its own name, unless the said ice cream was made only of the ingredients and in conformity with the butter fat standards established by said act.

Third. That Chapter 175 of the Laws of the 34th General Assembly of the State of Iowa did not establish an arbitrary classification and did not deny to defendants the equal protection of the law as guaranteed by the Fourteenth Amendment to the Constitution of the United States, in prohibiting the sale of ice cream under its own name unless the said ice cream was made only of the ingredients specified and in conformity with the butter fat standards established by said act and in classifying ice cream as "ice cream," "fruit ice cream" and "nut ice cream" and requiring 12 per cent of butter fat by weight in "ice cream" and 10 per cent of butter fat by weight in "fruit ice cream" and "nut ice cream."

Fourth. That Chapter 175 of the Laws of the 34th General Assembly of the State of Iowa was not an arbitrary and unreasonable regulation and interference with a lawful business and did not abridge the privileges and immunities of the defendants and deprive them of their liberty or property, as guaranteed to them by the Fourteenth Amendment to the Constitution of the United States.

Fifth. That the legislature of a state had the right under the police power to select one formula for a product which was not a substitute for or an imitation of another product and prohibit the sale of that product under its own name unless the product conformed to the specified formula and that Chapter 175 of the Laws of the 34th General Assembly of the State of Iowa so providing as to ice cream, did not abridge the privileges and immunities of the defendants and deprive them of their liberty or property, as guaranteed to them by the Fourteenth Amendment to the Constitution of the United States.

"For which errors the defendants-appellees, the Hutchinson Ice Cream Company and C. J. Hutchinson, Manager, pray that the said judgment of the Supreme Court of the State of Iowa, dated May 12, 1914, be reversed and a judgment rendered in favor of the defendants-appellees and for costs."

R. L. PARRISH,  
*Attorney for Appellees.*

41

## Supreme Court of Iowa.

No. 29784.

STATE OF IOWA, Appellant,  
againstHUTCHINSON ICE CREAM COMPANY and C. J. HUTCHINSON, Man-  
ager, Appellees.*Petition for Writ of Error.*

Considering themselves aggrieved by the final decision of the Supreme Court in rendering judgment against them in the above entitled case, the appellees hereby pray a writ of error, from the said decision and judgment, to the U. S. Supreme Court, and an order fixing the amount of a supersedeas bond.

Assignments of error herewith.

R. L. PARRISH,  
*Attorney for Appellees.*

STATE OF IOWA,  
*Supreme Court, ss:*

Let the writ of error issue upon the execution of a bond by the Hutchinson Ice Cream Company and C. J. Hutchinson, Manager, to the State of Iowa, in the sum of Five Hundred Dollars; such bond when approved to act as a supersedeas.

Dated July 14th, 1914.

SCOTT M. LADD,  
*Chief Justice Supreme Court of Iowa.*

42 HUTCHINSON ICE CREAM COMPANY and C. J. HUTCHINSON,  
Manager, Plaintiffs in Error,

VS.

STATE OF IOWA, Defendant-in-Error.

Know all men by these presents:

That we, the Hutchinson Ice Cream Company, and C. J. Hutchinson, Manager, as principals, and American Surety Co., of New York, and ————, ———— as sureties, are held and firmly bound unto the State of Iowa in the sum of Five Hundred Dollars (\$500.00) to be paid to the said State, for which payment well and truly to be made we bind ourselves jointly and severally firmly by these presents.

Sealed with our seals and dated this 2nd day of July, 1914.

Whereas the above named plaintiffs-in-error seek to prosecute their writ of error to the U. S. Supreme Court to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of Iowa,

Now, therefore, the condition of this obligation is such, that if the above named plaintiffs-in-error shall prosecute their said writ of

error to effect, and answer all costs and damages that may be adjudged if they shall fail to make good their plea, then this obligation to be void; otherwise to remain in full force and effect.

HUTCHINSON ICE CREAM COMPANY,  
By C. J. HUTCHINSON, *President*.  
C. J. HUTCHINSON.  
AMERICAN SURETY CO., OF NEW  
YORK, *Surety*.

Bond Approved and to Operate as a Supersedeas.  
Dated July 14, 1914.

SCOTT M. LADD,  
*Chief Justice Supreme Court of Iowa.*

43 UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honor-  
[SEAL.] able the Judges of the Supreme Court of the State of  
Iowa, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit or action between the State of Iowa and Hutchinson Ice Cream Company and C. J. Hutchinson, Manager, and wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title; right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened, to the great damage of the said Hutchinson Ice Cream Company and C. J. Hutchinson, manager, as is said and appears by their complaint. We, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward Douglass White, Chief Justice of



the United States, the — day of July, in the year of our Lord one thousand nine hundred and fourteen.

[Seal U. S. District Court, Southern District of Iowa.]

[SEAL.]

WM. C. McARTHUR,  
*Clerk of the District Court of the United  
States of America for the Southern  
District of Iowa,*

By LOUIS J. ADELMAN, *Deputy.*

The foregoing writ is hereby allowed.

SCOTT M. LADD,  
*Chief Justice Supreme Court of Iowa.*

44

Draft.

*Certificate of Lodgment.*

SUPREME COURT,

*State of Iowa, ss:*

I, B. W. Garrett, clerk of the said court, do hereby certify that there was lodged with me as such clerk on July 14, 1914, in the matter of the Hutchinson Ice Cream Company, and C. J. Hutchinson, Manager, against the State of Iowa;—

1. The original bond of which a copy is herein set forth.

2. Two copies of the writ of error, as herein set forth, one for the defendant, and one to file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office, in Des Moines, Iowa, this 14th day of July, 1914.

[Seal of the Supreme Court of Iowa.]

[SEAL.]

B. W. GARRETT,  
*Clerk Supreme Court of Iowa.*

45

*Citation.*

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the State of Iowa, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the office of the clerk of the Supreme Court of the State of Iowa, wherein the Hutchinson Ice Cream Company and C. J. Hutchinson, Manager, are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the

parties in that behalf. Witness, The Chief Justice of the Supreme Court of the State of Iowa, this 14<sup>th</sup> day of July, 1914.

[Seal of the Supreme Court of Iowa.]

[SEAL.]

SCOTT M. LADD,  
*Chief Justice Supreme Court of Iowa.*

Attest:

B. W. GARRETT,  
*Clerk Supreme Court of Iowa.*

DES MOINES, IOWA, July —, 1914.

I, attorney of record for the defendant in error in the above entitled case, hereby acknowledge due service of the above citation, and enter an appearance in the Supreme Court of the United States.

GEORE COSSON,  
*Attorney for the State of Iowa.*

46

Draft.

*Return to Writ.*

UNITED STATES OF AMERICA,  
*Supreme Court of Iowa, ss:*

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States, a duly certified transcript of the complete record and proceedings in the within entitled case, together with all things concerning the same.

In witness whereof, I hereunto subscribe my name, and affix the seal of said Supreme Court of Iowa, in the City of Des Moines, this 14<sup>th</sup> day of July, 1914.

[Seal of the Supreme Court of Iowa.]

[SEAL.]

B. W. GARRETT,  
*Clerk Supreme Court of Iowa.*

*Costs of Suit.*

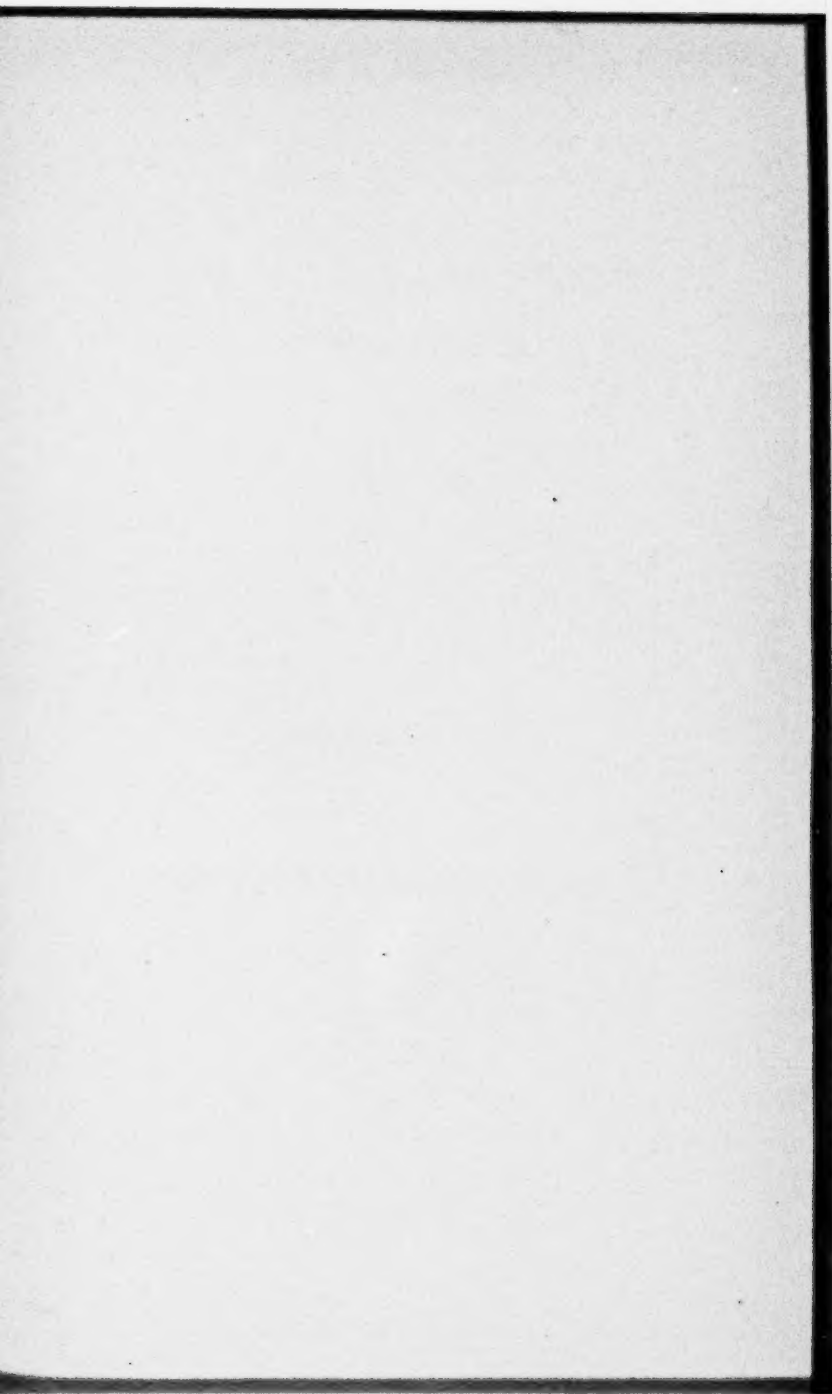
Costs of transcript, \$6.80 paid by the Hutchinson Ice Cream Company, and C. J. Hutchinson, Manager.

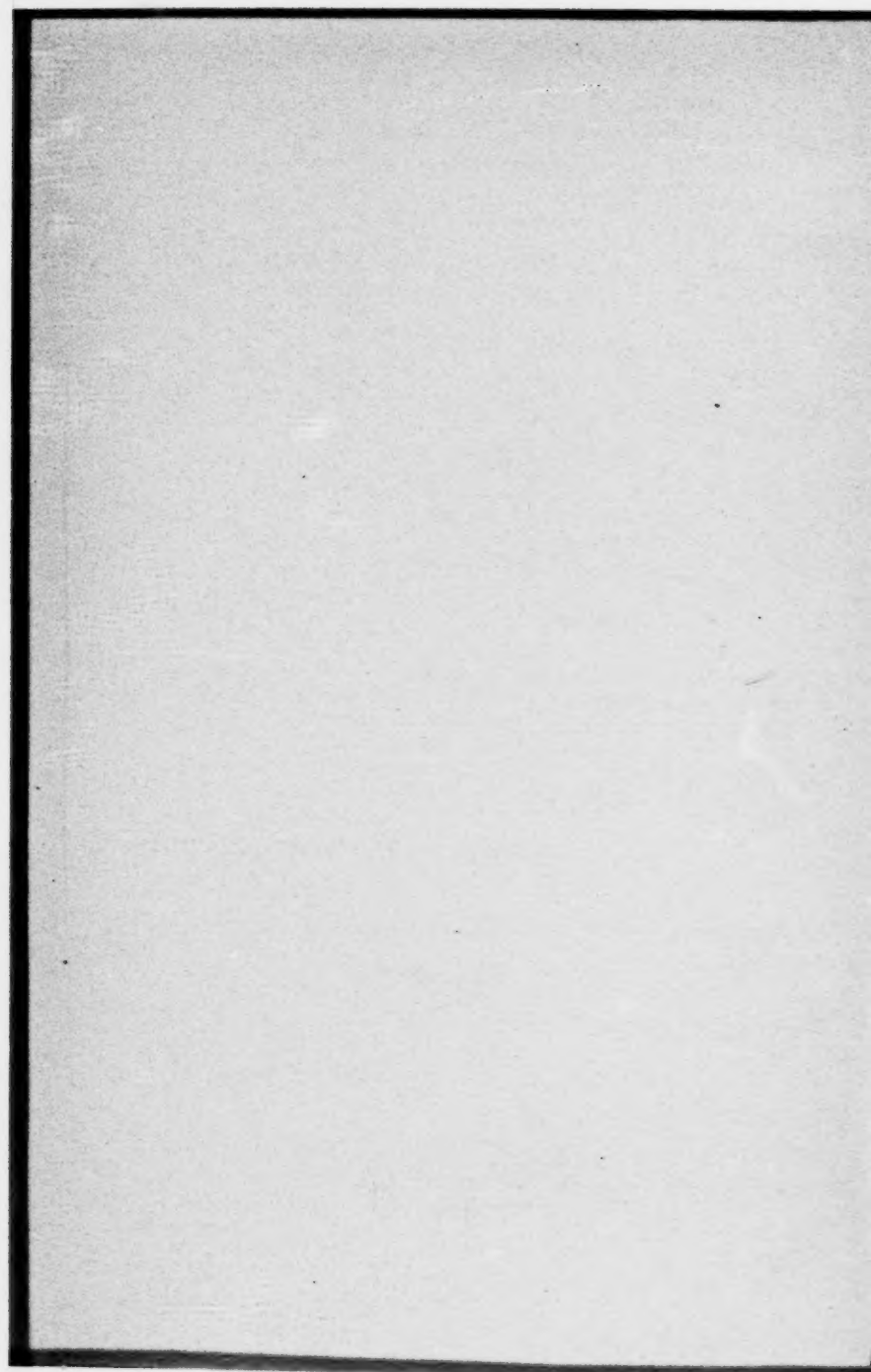
[Seal of the Supreme Court of Iowa.]

B. W. GARRETT, *Clerk.*

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Supreme Court, U. S.

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**OCT 4 1916**

**JAMES D. MAHER**  
CLERK

**SUPREME COURT OF THE UNITED STATES.**

**OCTOBER TERM, 1916.**

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**No. 40.**

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**THE HUTCHINSON ICE CREAM COMPANY AND C. J.  
HUTCHINSON, MANAGER, PLAINTIFFS IN ERROR,**

*vs.*

**THE STATE OF IOWA.**

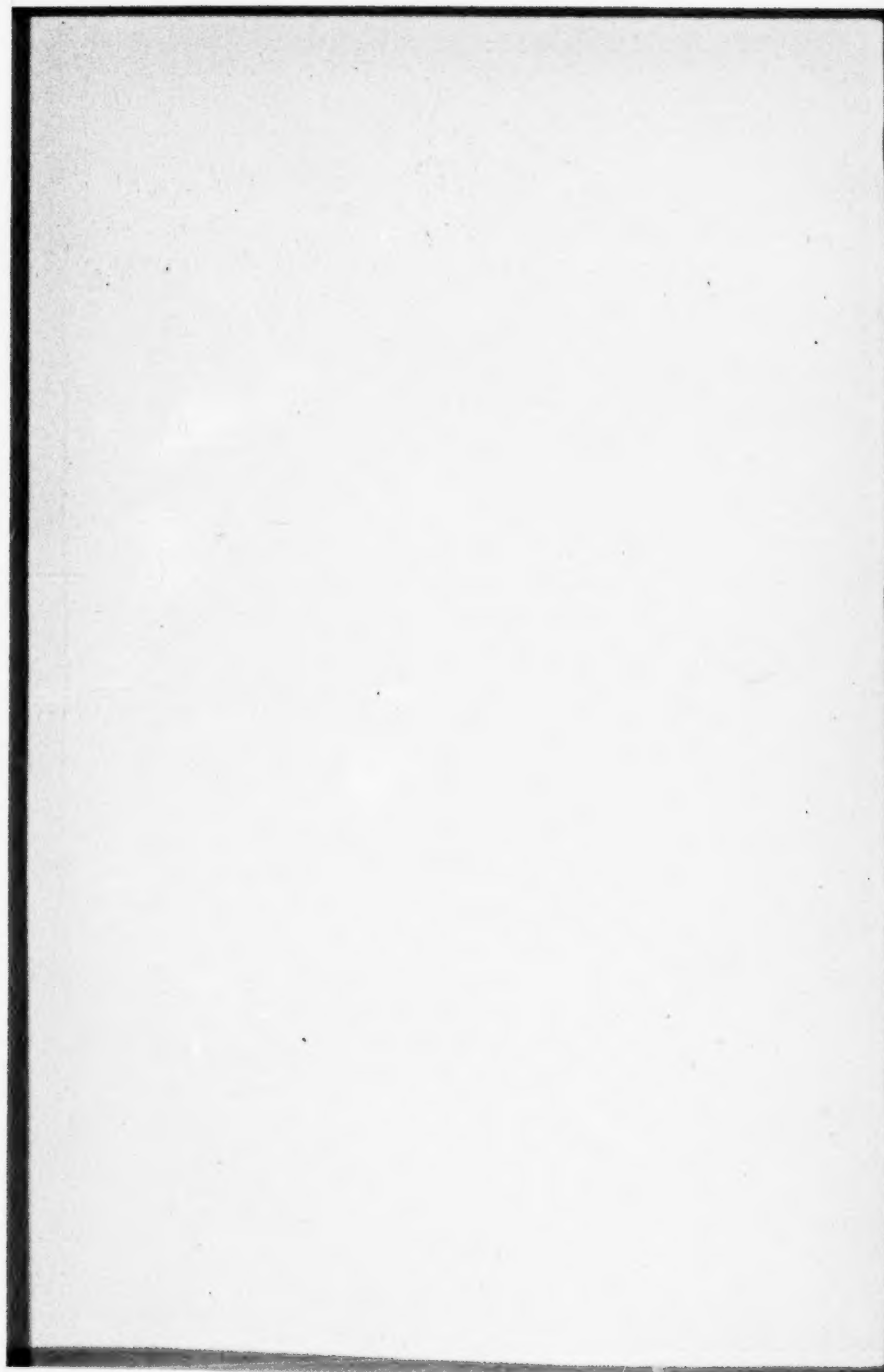
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**BRIEF FOR PLAINTIFFS IN ERROR.**

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**vs.**

**THE STATE OF IOWA.**

---

## **BRIEF FOR PLAINTIFFS IN ERROR.**

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This is a writ of error upon a judgment of the Supreme Court of Iowa which reversed a judgment of the District Court of Iowa, which district court held the statute in question to be unconstitutional.

The Hutchinson Ice Cream Company and its manager were prosecuted upon an information before a justice of the peace at Des Moines, Iowa, charged with the sale of adulterated food, in that it did sell "a certain food product called 'ice cream' which was adulterated in that it did not conform to the standards established by law, being deficient in butter fat" (Record, p. 3).

The Iowa statutes on which the prosecution is based are as follows:

Supplement to the Code, section 4999-a-22, subdivision 4, defining adulteration of food, provides that "any food that does not conform to the standards established by law is adulterated food," and section 4999-a-20 of the Supplement to the Code, which provides a penalty for selling a food product which does not conform to the said standard established by law, and chapter 175 of the thirty-fourth General Assembly of Iowa, which is an act to amend section 4999 of the Code relating to food standards, in part is as follows:

"Section 1. Ice cream is the frozen product made from pure, wholesome sweet cream and sugar with or without flavoring, and if desired the addition of not to exceed 1 per cent by weight of a harmless thickener, and contains not less than 12 per cent by weight of milk fat and the acidity shall not exceed three-tenths of 1 per cent."

The defendants demurred to the information on the ground, among others—

"That said statute is in violation of section 1, Fourteenth Amendment to the Constitution of the United States in that it arbitrarily interferes with personal liberty and private property without due process of law, having in fact no relation to the public health, comfort or welfare (Record, p. 3).

This demurrer was overruled by the magistrate, who upon hearing found defendants guilty and assessed against them a fine of \$50.00, and judgment was entered accordingly. The plaintiffs in error appealed to the District Court of Polk County, Iowa, which sustained the demurrer of the plaintiffs in error, on the ground that the statute in question was unconstitutional, as being in violation of both the State constitution and the Constitution of the United States, and discharged the plaintiffs in error. (See Record, pp. 4-6.)

Thereupon the defendants in error appealed from the rul-

ing of the district court to the Supreme Court of the State of Iowa, and, in an opinion filed May 12, 1914, the Supreme Court of Iowa reversed the ruling and decision of the district court. (See Record, pp. 8-21.)

Thereupon the Hutchinson Ice Cream Company and C. J. Hutchinson sued out their writ of error from the said ruling and decision of the Iowa Supreme Court to the Supreme Court of the United States, which was allowed by the chief justice of the Supreme Court of Iowa (Record, pp. 24, 25).

### **Specifications of Error.**

The Supreme Court of Iowa erred in holding and deciding:

First. That chapter 175 of the laws of the thirty-fourth General Assembly of the State of Iowa did not abridge the privileges and immunities of citizens or of these plaintiffs in error, nor deprive them of liberty or property without due process of law, nor deny to them the equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Second. That chapter 175 of the laws of the thirty-fourth General Assembly of the State of Iowa did not abridge the privileges and immunities of the plaintiffs in error, nor deprive them of their liberty or property in prohibiting the sale of ice cream under its own name, unless the said ice cream was made only of the ingredients and in conformity with the butter-fat standards established by said act.

Third. That chapter 175 of the laws of the thirty-fourth General Assembly of the State of Iowa did not establish an arbitrary classification and did not deny to defendants the equal protection of the law, as guaranteed by the Fourteenth Amendment to the Constitution of the United States, in prohibiting the sale of ice cream under its own name unless the said ice cream was made only of the ingredients specified and

in conformity with the butter-fat standards established by said act, and in classifying ice cream as "ice cream," "fruit ice cream" and "nut ice cream," and requiring 12 per cent of butter fat by weight in "ice cream" and 10 per cent of butter fat by weight in "fruit ice cream" and "nut ice cream."

Fourth. That chapter 175 of the laws of the thirty-fourth General Assembly of the State of Iowa was not an arbitrary and unreasonable regulation and interference with a lawful business, and did not abridge the privileges and immunities of the plaintiffs in error and deprive them of their liberty or property, as guaranteed to them by the Fourteenth Amendment to the Constitution of the United States.

Fifth. That the legislature of a state had the right under the police power to select one formula for a product which was not a substitute for or an imitation of another product and prohibit the sale of that product under its own name unless the product conformed to the specified formula, and that chapter 175 of the laws of the thirty-fourth General Assembly of the State of Iowa so providing as to ice cream, did not abridge the privileges and immunities of the plaintiffs in error and deprive them of their liberty or property, as guaranteed to them by the Fourteenth Amendment to the Constitution of the United States (Record, p. 22).

## BRIEF OF ARGUMENT.

### POINT I.

*The police power may be exercised to protect the public health, morals, safety, and the general welfare, but it is at all times subject to the constitutional limitation that it may not arbitrarily take away the lawful rights of a citizen.*

Statutes State of Iowa.

Lawton *vs.* Steele, 152 U. S., 133, 137.

Connolly *vs.* Union Sewer Pipe Co., 184 U. S., 540, 558.

Dobbins *vs.* Los Angeles, 195 U. S., 223.

Yick Wo *vs.* Hopkins, 118 U. S., 356.

Chicago B. & Q. R. Co. *vs.* Ill., 200 U. S., 561, 592.

Murphy *vs.* People State of California, 225 U. S., 623.

Coppage *vs.* Kansas, 236 U. S., 1.

Commonwealth *vs.* Vrooman, 164 Pa., 316.

Toledo W. & W. R. W. Co. *vs.* City of Jacksonville, 67 Ill., 37.

People *vs.* Ringe, 197 N. Y., 149.

People *vs.* Havnor, 149 N. Y., 200.

People *vs.* Gillson, 109 N. Y., 397.

Austin *vs.* Tennessee, 179 U. S., 344.

Welsh *vs.* Swasey, 214 U. S., 91.



## POINT II.

*Whether a particular regulation is a valid exercise of the police power is ultimately a judicial, not a legislative, question.*

- Dobbins *vs.* Los Angeles, 195 U. S., 223, 235.  
 Mugler *vs.* Kansas, 123 U. S., 622, 661.  
 Gulf C. & S. F. R. Co. *vs.* Ellis, 165 U. S., 150, 154.  
 Lochner *vs.* New York, 198 U. S., 45, 60.  
 Ives *vs.* Buffalo Ry. Co., 201 N. Y., 305.  
 Freund on Police Power, p. 53.  
 State *vs.* Marshal, 64 N. H., 549.  
 State *vs.* Myers, 42 W. Va., 822.  
 Price *vs.* People, 61 N. E., 344; 193, Ill., 114.  
 Price *vs.* Illinois, 238 U. S., 446.

## POINT III.

*"Ice cream" is a generic term embracing a large number and variety of products, and ice cream has been sold under its own name for over one hundred years; it is not an imitation of or a substitute for any other confection or food.*

- Brief on the History and Present Meaning of Term  
 "Ice Cream." Appendix.  
 Van Bremen *vs.* United States, 192 Fed., 904.  
 United States *vs.* Thirty Cases of Grenadine Syrup,  
 199 Fed., 932.  
 United States *vs.* One Car Load of C. H. & M. Feed,  
 188 Fed., 452.  
 Webster's Dictionary.  
 Century Dictionary.  
 Standard Dictionary.  
 U. S. Manual for Army Cooks.

## POINT IV.

*The act in question as construed by the Supreme Court of Iowa is actually a prohibition of the sale of an admittedly wholesome article of food under its own name and enacts a purely arbitrary standard.*

- Forsythe *vs.* Hammond, 166 U. S., 506, 519.  
 Soon Hing *vs.* Crowley, 113 U. S., 703.  
 Yick Wo *vs.* Hopkins, 118 U. S., 356, 366.  
 Railroad & Telephone Co. *vs.* Brand of Equalysis,  
 85 Fed. Rep., 302, 317.  
 Heath & Milligan Mfg. Co. *vs.* Wurst, 207 U. S.,  
 338.  
 Collins *vs.* New Hampshire, 171 U. S., 30.  
 Peo. *ex rel.* Farrington *vs.* Mensching, 187 N. Y., 8.  
 Nichol *vs.* Ames, 173 U. S., 509, 521.  
 State *vs.* Miksicek, 125 S. W., 501.  
 Coppage *vs.* Kansas, 236 U. S., 1.

## POINT V.

*The act in question does not tend to prevent fraud.*

- People *vs.* Freeman, 242 Ill., 373.  
 Schollenberg *vs.* Penn., 171 U. S., 1.  
 State *vs.* Hanson, 136 N. W., 412.  
 State *vs.* Redman, 114 N. W., 137.  
 Brown *vs.* Piper, 91 U. S., 37.  
 Muller *vs.* Oregon, 208 U. S., 412.

## POINT VI.

*If a standard for ice cream could be enacted under the police power, nevertheless the sale of ice cream as ice cream, even though it did not conform to such standard, could not under the police power be absolutely prohibited.*

- Rigbers *vs.* City of Atlanta, 66 S. E., 991.  
 Heath & Milligan Co. *vs.* Worst, 207 U. S., 338.  
 Murphy *vs.* California, 225 U. S., 623.

**ARGUMENT.****POINT I.**

*The police power may be exercised to protect the public health, morals, safety, and general welfare, but it is at all times subject to the constitutional limitation that it may not arbitrarily take away the legal rights of a citizen.*

The statutes of the State of Iowa which affect the question at issue provide as follows:

Section 4999-a-21 provides in part: "The word 'food' as herein used shall include all articles used for food, drink, confectionery or condiment, \* \* \* by man or domestic animals, whether simple, mixed or compound."

Section 4999-a-22 defines adulteration and states in part that \* \* \* "Fourth. If it be an imitation of, or offered for sale, under the specific name of another article, or if it does not conform to the standards established by law."

The act in question is an act supplementing the code relating to food standards and which establishes an ice-cream standard. The entire act, after the enacting clause, reads as follows:

"1. Ice-cream. Ice-cream is the frozen product made from pure wholesome sweet cream, and sugar, with or without flavoring, and if desired, the addition of not to exceed one per cent. (1%) by weight of a harmless thickener, and contains not less than twelve per cent. (12%) by weight of milk fat, and the acidity shall not exceed three-tenths (3/10) of one per cent. (1%).

"2. Fruit ice-cream. Fruit ice-cream is the frozen product made from pure, wholesome sweet cream, sugar, and sound, clean, mature fruits, and, if desired, the addition of not to exceed one per cent. (1%) by weight of a harmless thickener and contains not less than ten per cent. (10%) by weight of milk fat.

"3. Nut ice-cream. Nut ice-cream is the frozen product made from pure, wholesome sweet cream, sugar and sound, non-rancid, nuts, and, if desired, the addition of not to exceed one per cent. (1%) by weight of harmless thickener, and contains not less than ten per cent (10%) by weight of milk fat."

The Fourteenth Amendment protects the right of the citizen to engage in any lawful business, and when, as here, the business is not affected with any public interest the business can only be reasonably regulated.

*Murphy vs. California*, 225 U. S., 623.

This is stated in different language by Mr. Justice Pitney in *Coppage vs. Kansas*, 236 U. S., 1, where, writing for the court, he says at page 19:

"But, in our opinion the Fourteenth Amendment debars the States from striking down personal liberty or property rights or materially restricting their normal exercise, excepting so far as may be incidentally necessary for the accomplishment of some other and paramount object, and one that concerns the public welfare. The mere restriction of liberty or of property rights cannot of itself be denominated public welfare, and treated as a legitimate object of the police power; for such restriction is the very thing that is inhibited by the amendment."

In *Walsh vs. Swasey*, 214 U. S., 91, Mr. Justice Peckham, speaking for the court, said at page 105:

"The statutes have been passed under the exercise of the so-called police power, and they must have some fair tendency to accomplish or aid in the accomplishment of some purpose for which the legislature may use the power. These principles have been so frequently decided as not to require the citation of many authorities. If the means employed pursuant to the statute have no real substantial relation to a public object which government can ac-

compish, if the statutes are arbitrary and unreasonable and beyond the necessities of the case, the courts will declare their invalidity."

It is under the police power that the State seeks to uphold its right to standardize ice cream and we find that the court below (Record, p. 13) says the act is one to prevent fraud. We will discuss this at length under Point V, and point out that even if it were such an act it is unconstitutional, as being an absolute prohibition instead of a regulation (Point VI).

We direct attention of the court at this point to the fact that there is *no question of public health* involved in this case. (Opinion Iowa Supreme Court, page 6; Record, p. 13.)

The State makes no such claim nor could it do so. Certainly the percentage of butter fat in ice cream has nothing to do with its healthful qualities. Pure milk frozen with sugar and flavor, though it would contain less than three per cent of butter fat, would certainly not be claimed to be unhealthful. Water ices contain no butter fat at all, and certainly are healthful.

In the court below the State contended that "price" was an argument, in other words that the State could insist on a certain butter fat content in ice cream, so that the consumer would get his money's worth, and argued that the man who got a less percentage than that set by the statute was defrauded. Of course this would be an argument only when the *price* at which ice cream is sold is also fixed by statute. Because of these generalizations about the police power we wish to direct attention to a few decisions referring to the limitations of such power.

The police power is not unlimited, there must be a basis, an excuse, a reason for its exercise.

Commonwealth *vs.* Vrooman, 164 Pa., 316.

Or, as was said in the case of Toledo W. & W. R. W. Co. *vs.* City of Jacksonville, 67 Ill., 37:

"Like other powers of the Government there are constitutional limitations to its exercise. It is not within the power of the General Assembly under the pretense of exercising the police powers of the State to enact laws not necessary to the preservation of the health and the safety of the community which will be oppressive and burdensome upon the citizen. If it prohibit that which is harmless in itself or command that to be done which does not tend to promote the health, safety or welfare of society, it would be an unauthorized exercise of power and it would be the duty of the courts to declare such legislation void."

A Pennsylvania case which disposes directly of this question is the case of *Powell vs. Commonwealth*, 114 Pa., 273, where the opinion of the lower court says:

"We think the line between the valid exercise of this police power and the invasion of private rights is well drawn in the opinion of the court by Earl, J., in *Jacobs' case*, 98 N. Y., 98, thus: 'Generally it is for the legislature to determine what laws and regulations are needed to protect the public health and secure the public comfort and safety, and when its measures are calculated, intended convenient, and appropriate to accomplish these ends, the exercise of its discretion is not subject to review by the courts. But they must have some relation to these ends. Under the mere guise of police regulations, personal rights and private property cannot be arbitrarily invaded, and the determination of the legislature is not final and conclusive. If it passes an act ostensibly for the public health, and thereby destroys or takes away the property of a citizen and interferes with his personal liberty, then it is for the courts to scrutinize the act and see whether it really relates to, and is convenient and appropriate to promote the public health. It matters not that the legislature may, in the title to the act, or in its body declare that it is intended for the improvement of the public health. Such a declaration does not conclude the courts, and they must yet determine the fact declared, and enforce the supreme law.'



"To the same effect is *Commonwealth vs. Bearse*, 132 Mass., 542, where, speaking of the exercise of the police power, it is said: 'The legislature is largely the judge of its own powers with reference to these matters. If it can be seen, indeed, that the rights of property are invaded under the pretense of a police regulation, it would be our duty to interfere to protect them.'"

In the case of *People vs. Ringe*, 197 N. Y., 149, Chase, J., said:

"A statute passed pursuant to the police power should be reasonable. Its real purpose must be to protect the public health, morals or general welfare. A statute cannot, under the guise of the police power, but really to effect some purpose not within such power, arbitrarily interfere with a person or property right."

The same principle was stated by Vann, J., in *People vs. Havnor*, 149 N. Y., 200:

"It was expressly declared in that case (*People vs. Gillson*, 109 N. Y., 389) that the courts must be able to see, upon a perusal of the enactment, that there is some fair, just and reasonable connection between it and the common good, and that unless such relation exists the statute cannot be upheld as an exercise of the police power."

See also *People vs. Gillson*, 109 N. Y., 397, where it is said:

"The following propositions are firmly established and recognized; a person living under our Constitution has the right to adopt and follow such lawful industrial pursuit, not injurious to the community, as he may see fit. The term 'liberty' as used in the Constitution is not dwarfed into mere freedom from physical restraint of the person of the citizen as by incarceration, but is deemed to embrace the right of man to be free in the enjoyment of the faculties with which he has been endowed by his

Creator, subject only to such restraints as are necessary for the common welfare. Liberty, in its broad sense, as understood in this country, means the right not only of freedom from servitude, imprisonment or restraint, but the right of one to use his faculties in all lawful ways to live and work where he will, to earn his livelihood in any lawful calling and to pursue any lawful trade or avocation. These principles are contained and stated in the above language in various cases, among which are *Live Stock Association vs. Crescent City, etc., Co.*, 1 Abb. (U. S.), 388, 398; *Slaughter House Cases*, 16 Wall., 36, 106; *Matter of Jacobs*, 98 N. Y., 98; *Bertholf vs. O'Reilly*, 74 N. Y., 509; *People vs. Marx*, 99 N. Y., 377."

In the case of *Lawton vs. Steele*, 152 U. S., in the opinion of the court, at page 137, discussing the extent and limit of the police power, the court says:

"To justify the State in thus interposing its authority in behalf of the public, it must appear first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purposes, and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business or impose unusual and unnecessary restrictions on lawful occupations. In other words, its determination as to what is a proper exercise of its police power is not final or conclusive but is subject to the supervision of the courts."

In the case of *Austin vs. Tennessee*, 179 U. S., 343, the court, speaking by Mr. Justice Brown, at page 344, said:

"We are not disposed to question the general principle that the States cannot, under the guise of inspection of products, forbid or impede the introduction of products, and more particularly of food products, universally recognized as harmless, *Minnesota vs. Barber*, 136 U. S., 313; *Brimmer vs. Rebman*, 138

U. S., 78, or otherwise burden foreign or interstate commerce by regulations adopted under the assumed police power of the State, but obviously for the purpose of taxing such commerce or creating discriminations in favor of home producers or manufacturers. *The Passenger Cases*, 7 How., 283; *Welton vs. Missouri*, 91 U. S., 275; *Henderson vs. New York*, 92 U. S., 259; *Railroad Co. vs. Hausen*, 95 U. S., 465; *Guy vs. Baltimore*, 100 U. S., 434; *Ward vs. Maryland*, 12 Wall., 418; *People vs. Compagnie Gen. Transatlantique*, 107 U. S., 59. In this connection we indorse fully what was said by this Court in *Mugler vs. Kansas*, 123 U. S., 623, 661; 'If, therefore, a statute purporting to have been enacted to protect the public health, the public morals or the public safety has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby to give effect to the Constitution.' "

This court, in the case of *Connelly vs. Union Sewer Pipe Co.*, 184 U. S., 540, said, at page 558:

"The question of constitutional law to which we have referred cannot be disposed of by saying that the statute in question may be referred to what are called the police powers of the State, which, as often stated by this court, were not included in the grants of power to the General Government, and therefore were reserved to the States when the Constitution was ordained. But as the Constitution of the United States is the supreme law of the land, anything in the Constitution or statutes of the States to the contrary notwithstanding, a statute of a State, even when avowedly enacted in the exercise of its police powers, must yield to that law. No right granted or secured by the Constitution of the United States can be impaired or destroyed by a State enactment, whatever may be the source from which the power to pass such enactment may have been derived. 'The nullity of any act inconsistent with the Constitution is produced by the declaration that the Constitution is the supreme law.' The State has undoubtedly

the power by appropriate legislation to protect the public morals, the public health and the public safety, but if, by their necessary operation, its regulations looking to either of those ends amounts to a denial to persons within its jurisdiction of the equal protection of the laws they must be deemed unconstitutional and void. *Gibbons vs. Ogden*, 9 Wheat. 1, 210; *Sinnot vs. Davenport*, 22 How., 227, 243; *Missouri, Kansas & Texas Railway vs. Haber*, 169 U. S., 613, 626."

See also:

*Dobbins vs. Los Angeles*, 195 U. S., 223.

*Yick Wo vs. Hopkins*, 118 U. S., 356.

*Chicago, B. & S. R. Co. vs. Illinois*, 200 U. S., 561.

## POINT II.

*Whether a particular regulation is a valid exercise of the police power is ultimately a judicial, not a legislative, question.*

It is so frequently argued that the legislature having enacted a standard the courts are powerless in the matter that a brief reference to a few authorities on this subject is submitted.

Freund, in his work on the Police Power, says at page 53:

"If courts say that the legislature is the sole judge of the propriety of a regulation of this character they simply surrender their power to control the validity of legislation."

*State vs. Marshall*, 65 N. H., 549.

*State vs. Myers* 42 W. Va., 822.

The Illinois courts have held that the question as to what are proper subjects of the police power is a judicial one.

*Price vs. People*, 61 N. E., 344; 193 Ill., 114.

The New York Court of Appeals, speaking by Werner, J., in *Ives vs. Buffalo Ry. Co.*, 201 N. Y., 395, says:

"But when an industry or calling is *per se* lawful and open to all, and therefore beyond the prohibitive power of the legislature, the right of governmental control must be confined to such reasonable enactments as are directly designed to conserve health, safety, comforts, morals, peace and order" (*Lochner vs. New York*, 198 U. S., 45)."

The sale of a wholesome article of food is within the constitutional protection of liberty and property.

*Chicago vs. Natcher*, 183 Ill., 104.

*Helena vs. Dwyer*, 645 Ark., 424.

*In re Jacobs*, 98 N. Y., 110.

*People vs. Bismeyer*, 169 N. Y., 53, 57.

In view of the fact that this court has recently considered the validity of a statute affecting the sale of a preservative for foods, a further discussion is deemed unnecessary.

*Price vs. Ill.*, 238 U. S., 446.

### POINT III.

*"Ice cream" is a generic term embracing a large number and variety of products, and ice cream has been sold under its own name for over one hundred years. It is not an imitation or a substitute for any other confection or food.*

The statute in controversy assumes to define ice cream and in effect provides that ice cream shall, from the date of the enactment of the statute, cease to be that product commonly and customarily known as ice cream, and shall become a new and different commodity by fiat of the legislature.

The State reasons that because the legislature has enacted this statute all ice cream not containing twelve per cent of better fat is a spurious article. Such reasoning is without basis, for it begs the entire question, which is, What was ice cream within the common knowledge of the people be-

fore the statute was enacted? In other words, has the Iowa legislature attempted to deprive manufacturers and dealers of the right to sell a wholesome product under its own name?

Our proposition is that "ice cream" is not and never was, at least previous to the enactment of the statute in controversy, a term used to designate a product containing any stated amount or proportion of butter fat. The question is, What idea does the term "ice cream" convey to persons of ordinary intelligence who are conversant with our language?

To answer this question we must find out what ice cream is. We first find that the term "ice cream" is generic, like "candy," "confectionery," "bread," "cake," "pudding," "soup," etc. It is the general name for a large class or group of products having some characteristics in common, but varying widely as to ingredients—this variety extending to kind as well as to proportions.

A case involving the question of the common acceptance of a term is *United States vs. Thirty Cases Purporting to be Grenadine Syrup*, 199 Fed., 932. It is elementary that the court, to find the meaning of a term, may resort to any authoritative sources of information to enlighten its judgment, but the case of *United States vs. One Car Load of Corno H. & M. Feed*, 188 Fed., 452, makes clear the distinction between common knowledge and common ignorance. In that case the Government attempted to prove common knowledge by showing that their inspectors interviewed a number of persons, who stated that if he showed them a label reading "oat feed" they would expect to get ground or crushed oats. It was not shown that the persons of whom the inspectors inquired had any knowledge of the commodity "oat feed." The court held such testimony valueless, saying in part, at page 462:

"The issue, however, is not what such persons with such lack of familiarity with the product would understand 'oat feed' meant, but what idea the term ought to convey to persons of ordinary intelligence,



who are conversant with our language. The power of Congress to pass the statute is derived solely from its authority to regulate commerce, and it must have uniform operation throughout the United States. It deals with articles of food which enter into interstate commerce. It would be unthinkable that Congress intended that a product could be seized in one district and not in another for a misleading brand, according or not as the generality of persons in those districts understood or were deceived by the brand on the particular product.

"Language is 'the expression of thought by means of spoken or written words,' and words are but signs of ideas. If a person does not know English, he cannot understand the idea or conception or sign meant to be conveyed by a word. So as to a commodity term; people unfamiliar with the term or its meaning, seeing on a label the word which stands for a commodity term, would not know what it meant, and numbers of them would state, quite honestly, that, seeing the words 'oat feed' on the label, they were deceived as to what it meant and thought 'oat feed' meant to describe the grain of the oat, rolled, crushed, or chopped.

"All words in the beginning were arbitrary signs. They became part of the language only by common usage among the people after they had generally been accepted or taken to express or stand for a particular thought or idea. When a word obtains such currency or general acceptance, the people use it to convey that particular idea to the persons to whom it is addressed, and the word continues to have that meaning and function in the language until common usage among the people accords another and different meaning to it. Language grows and changes with the growth and changes in social and economic conditions, and expressions creep into the language by a gradual process of evolution wrought by the necessity for more precise expressions and greater convenience in depicting old ideas or new conditions and things. Words are thus being constantly coined and put in circulation, and, their meaning being generally understood among the people, they become accepted parts of our speech, sometimes for years, before they are formally acknowledged and incor-

porated in standard dictionaries. A century ago no one would have understood what idea was meant to be conveyed by the words, 'chloroform,' 'telephone,' 'telegraph,' 'aeroplane,' 'automobile,' 'X-ray' and the like. Now they are common nouns, parts of common speech, and understood by all who speak our language."

See also *Von Bremen vs. United States*, 192 Fed., 904.

Applying the above principles to the present case, we ask a consideration of the question as to what is the true meaning and use of the term "ice cream" as generally understood among the people and as commonly used in trade and commerce.

The common knowledge that ice cream is made in various ways is recognized and plainly indicated in various dictionaries, where "ice cream" is defined as follows:

Webster—

"Cream or milk sweetened, flavored and congealed by a freezing mixture. Sometimes, instead of a cream, the materials of a custard are used."

Century—

"A confection made by congealing variously flavored cream or custard in a vessel surrounded with a freezing mixture."

Standard—

"Cream, milk, or custard, sweetened and flavored, and frozen by a freezing mixture, being usually agitated by a dasher in the process, to make it of uniform consistency."

From this it appears that while ice cream may be made of cream, sugar and flavor, it may also be made of milk, sugar and flavor, or of custard. It follows that the three principal ingredients here mentioned might be combined in an ice cream. The cook books in general use today as well as those of an earlier time are warrant for the statement

that a very much wider variety of ingredients has been used in ice cream from the time it came into common use as a dessert and as a light refreshment.

It is and for many years has been the custom of the trade to use condensed or evaporated milk as an ingredient of ice cream. There is no fixed rule or custom as to the amount or proportion of condensed milk used, the amount or proportion being varied in different kinds of ice cream, and it is significant that the amount or proportion varies widely in the products of different manufacturers. In some ice creams no condensed milk is used; in some there is no cream, and in still others there is neither condensed milk nor cream. The Manual for Army Cooks, the official publication of the United States Army, prepared under the direction of the Commissary General of Subsistence and published by authority of the Secretary of War, shows this. In the edition of 1896, page 199, the formula given for ice cream is:

"1 pint milk, 1 scant cupful flour, 1 quart cream, 1 cupful sugar, 2 eggs, 1 tablespoonful flavoring extract.

"Boil the milk; mix together the sugar, flour, and eggs and stir into the boiling milk. Cook twenty minutes, stirring often. When cool add another cupful of sugar, the flavoring and cream. Freeze in ice and salt.

"Fruit of all kinds, chocolate, coffee, etc., can be used as flavoring."

The 1910 edition of this Manual for Army Cooks, at p. 117, gives, among other formulas for ice cream, the following:

"2½ quarts water, 3 ounces flour, 1½ pounds sugar, 10 eggs, ¼ ounce extract, 2 12-ounce cans evaporated milk."

"Boil 2 quarts of water and add a batter made of the flour and 1 pint of water; then allow to come to a boil again, remove from the range, and add the

sugar, eggs, a pinch of salt, flavoring extract, evaporated milk, and sufficient water to make 1 gallon. Whip well, and allow to cool before putting in the freezer. One gallon is sufficient for 20 men."

Eggs in varying amount or proportion are called for in some ice creams—some kinds of ice cream—while other ice creams are made without eggs. The same is true as to all other ingredients, for even sugar is omitted in some special cases.

No cook book offered with any pretense of completeness or authority limits ice cream to one formula (Appendix, p. 90). The dictionaries do not so limit ice cream (Appendix, p. 71). The custom of the trade and the custom of the people do not so limit it.

So that this act of the Legislature limiting the number of permissible ingredients in ice cream and requiring that ice cream shall contain not less than 12 per cent of butter fat, and limiting the application of the name "ice cream" to one type or kind of ice cream is nothing short of arbitrary and unreasonable, nothing short of an unwarranted interference with a lawful business—depriving manufacturers of ice cream of property rights of great value and depriving both manufacturers of ice cream and the people of their liberty.

The derivation and meaning of the term "ice cream" are important and must be here considered.

(Corno H. & M. Feed case, *supra*.)

It is submitted that there is no reasonable basis for the Legislature's assumption that ice cream made of cream, sugar and a flavor is the only real, genuine or pure ice cream. The name "ice cream" carries no such inference. The name or term comes to us from France by way of England. The French term is "crème glace" and the English translation of it is "cream ice" or "ice cream" (Appendix, p. 19). In England the form "cream ice" is in general use, while we give preference to "ice cream."

In France and in England and with us the group of cream ices or ice creams is but a subdivision of the family of ices. Our dictionaries tell us that an ice is a frozen dessert, as ice cream or water ice; and in many of our hotels and restaurants and many of our cook books the term "ices" is employed even today as a general name for all frozen desserts, including biscuits, puddings and charlottes as well as ice creams, water ices, punches, etc. So that it is common knowledge that ice cream is first of all an ice.

It is obvious, from the definition and standard laid down by the Legislature, that the Legislature acted on the violent assumption that the term "ice cream" is compounded of the verb "ice" and the noun "cream," and that the cream indicated is the cream from milk. Yet even the Legislature dared not to follow this assumption to its logical conclusion and say that such cream frozen is ice cream, but included sugar, flavor and a "thickener," recognizing custom and common knowledge to that extent. The Legislature did, however, dare to disregard all other custom and common knowledge that go to prove the error of giving to "cream" a preponderant value and narrow meaning in the term "ice cream."

Since the definition and standard laid down by the Legislature are inseparable, and it is not within the power of the Legislature to limit and restrict unreasonably the meaning and application of words or terms in common use, we ask this court to weigh the value of "cream" in the term "ice cream."

In cookery the word "cream" has various meanings and applications. We find it used as a verb, as an adjective and as a noun, and with such latitude that almost invariably it is necessary to go to the context to determine the sense in which it is used, and, especially where it is an element in a compound name or term, to determine whether it is preponderant or subsidiary. In the term "ice cream" we submit that "cream" is subsidiary.

Cooks and the makers of cook books have always used

the word "cream" with great freedom, and the fact that many of the meanings implied by their use of the word have become fixed in our language is the best evidence that the uses they made of the word were good.

The cook books are themselves the best evidence that the term "ice cream" has always been applied to all ices that were made principally of cream, that contained cream, or that were so compounded of various ingredients as to resemble cream in appearance or consistency. To other products, from confectionery, cakes and pastries to gruels, soups and gravies, the term has been and is applied with equal freedom and latitude, and we have yet to learn that it has been proposed to upset this usage in any case except that of cream ice or ice cream.

We protest that our extensive use of cream in the manufacture of ice cream is no warrant for the assumption that the public has been lately or ever was under the belief or impression that "cream" in the term "ice cream" means the cream from milk and nothing else. (Appendix pp. 12 and 13.) "Ice cream" means no more and no less today than it has meant since the term came into common use, and its meaning is well understood by the people generally; therefore our use of it as the general name for our products cannot deceive or tend to deceive our customers. The use and meaning of this term is stamped upon our language, as evidenced by our dictionaries and the record of its use in the same sense in which we use it today is preserved in the cook books of five or more generations.

We contend that the limiting of the meaning of the term "ice cream," not to say perversion, and the restriction of its application and use amount to an abridgement of the constitutional liberty of ice cream manufacturers and to a taking of their property without due process of law.

The citing of the other State standards merely shows how little basis there is for saying that ice cream should be made only from cream and contain twelve per cent of butter fat,



for we find that some other States refused to adopt standards, while others have adopted standards of 4, 7, 8, 12, and 14 per cent. of butter fat, and from permitting the product to be made of anything, as long as the required per cent. of butter fat is obtained, to requiring it to be made chiefly of milk substances, milk and cream, and finally of cream alone. This failure of the States to agree upon a standard shows conclusively that there is no such thing as a standard ice cream, and certainly does not tend to show that ice cream should be made of cream alone and contain 12 per cent. of butter fat.

In the court below reference was made to the so-called Government standard.

The so-called Government standard (Circular 19, U. S. Dept. of Agriculture) was issued under a provision of an appropriation law after Congress had refused to enact standards in the Food & Drugs Act and was issued *just four days before the Food & Drugs Act was approved*. The passage of the Food & Drugs Act left these standards without force; in fact, it never was an offense to violate them, as the appropriation bill contained no such provision. Attempts made to enforce these standards of Circular 19 were failures (*United States vs. St. Louis Coffee & Spice Mill*, 189 Fed., 191). In fact the Government itself successfully contended that it was not bound by these standards (*United States vs. 100 Bbls. of Vinegar*, 188 Fed., 471).

Discussing the standard for ice cream the Secretary of Agriculture states, under date of June 8, 1910:

"In answering the question in regard to this ice cream standard, it should be pointed out to you that Circular No. 19 has not the force and effect of law, and is not so construed by this Department in enforcing the Food & Drugs Act. It is used merely as an advisory factor."

Three attempts were made to enforce the so-called Government standard for ice cream.

The first was *United vs. Bischof*, tried in the Police Court (United States Branch), District of Columbia, before Judge Mullooney. The decision is reported in the Washington Law Reporter, Volume 38, page 137, and the court found:

"That the definition for ice cream, as promulgated by the Department of Agriculture, and set forth in Circular No. 19, is of no force or effect as a legal standard, and is only admissible in evidence as giving one definition of ice cream, namely, the definition of certain officials of the Department of Agriculture.

"That the percentage of butter fat had nothing to do with the determination as to whether or not the product in question was ice cream. The court said that from the five standard dictionaries examined by him and the information on the subject afforded by the evidence, it was not essential that ice cream be made entirely from pure cream, but milk might be added, or it may be made of a custard frozen, and denominated ice cream.

"As to what is a violation of the Pure Food Law, the court said: 'I do not define ice cream, as a matter of law; I simply say that upon the evidence in this case, an article composed of half milk and half cream, sweetened and flavored, with six ounces of what they call "cream thick," is not an adulteration or imitation of ice cream, within the meaning of the statute.'

"The court holds that one way to find out what the public, in general, have understood ice cream to be, is to take the definition for ice cream given in the standard dictionaries and the various recipes given in standard cook books."

The next case was tried in 1911 in the third judicial district of the Territory of Arizona. The case went to the jury, who found the defendant not guilty (United States Dept. of Agriculture, Notice of Judgment, No. 1446).

The third and last attempt was made in the same court and in the same year, 1911. The ice cream in question con-

tained 7.09 per cent of butter fat. The judge directed a verdict in favor of the defendant and found that there was no Government standard (United States Dept. of Agriculture, Notice of Judgment, No. 1450).

In connection with this question plaintiff in error has filed, as an appendix to its brief, a "Brief on the History and Present Meaning of the Term ICE CREAM," compiled by Professor Child, of the University of Pennsylvania. The court's attention is especially called to this appendix as being a most comprehensive, exact, and authoritative statement on that subject.

It is difficult by quotation to do justice to the completeness with which the author has demonstrated the real meaning of the term "ice cream." However, we venture to call attention to the following extract from page 27 of this compilation:

"No serious conflict exists between popular understanding and actual meaning of the term ice cream. Ice cream is so familiar an institution in the home, in the street, at the confectioner's—and, in the home, the male, as well as the female, members of the household, so generally engage in making it—that appeal can confidently be made to a universal understanding of its meaning. The dish is called typically *ice cream*, irrespective of its kinds, whether a cream mixture or water ice. One makes "ice cream," one buys it of the "ice cream" man in the street. In any of these cases "ice cream" may mean or include water ice.

"Further, it is a fact universally known that the term *ice cream* covers a wide variety of mixtures. It is known that very rarely, indeed, even in households that could well afford it, is ice cream made with cream of milk alone, because of the cost and as being too rich. It is very generally known that the amount of cream of milk may be varied according to the other ingredients used. It is very generally known that the addition of whites of eggs improves smoothness, and that the addition of yolks enriches the mixture and improves its color. It is everywhere known that

there is a gradation from rich mixtures down to use of milk only, in which cases in common domestic use cornstarch is added, and the mixture is brought to the boil. This, the poorest form of ice cream, is called 'frozen custard.' The only popular misapprehension is, as explained above, that the flavor disapproved of in this type of mixture is due to the presence of eggs, whereas it is due to the scalding or boiling in particular, to the presence of cornstarch, if used, and to the lack of compensating richness or intensity of flavoring, to cover the boiled taste."

Again Professor Child says (Appendix, p. 4):

"It has been asserted (cf. 1. 34) that *cream* in the compound *ice cream* means the oily part of milk, which it does not mean, did not mean when the compound was adopted in English, and has never meant since.

"Further (cf. 1. 35), it has been asserted that use of the term should be limited to the confection as made with cream (in that sense) alone—ostensibly for the interests of the public, but in violation of the true meaning, and, it may be added, plainly to the prejudice of the public interest, if due consideration is given the pertinent facts."

Finally, we refer the court to the argument as to the legality of butter fat standards for ice cream presented by Professor Child (Appendix, pp. 32 to 36, inclusive), which presents the layman's viewpoint tersely and, we submit, accurately.

## POINT IV.

*The act in question, as construed by the Supreme Court of Iowa, is actually a prohibition of the sale of an admittedly wholesome article of food under its own name, and enacts a purely arbitrary standard.*

It is a familiar principle as applied to the question of police power that the legislature cannot prohibit the sale of a wholesome commodity in the absence of fraud.

Assuming that we have shown that the term "ice cream" is, in the trade and to the common understanding, a generic term, having a well-established meaning as applied to a large number of varieties of a certain class of confections, so that the implications of fraud or deceit cannot possibly arise from the sale of any of these varieties under the generic name "ice cream," it necessarily follows that the legislature in this case has attempted to prohibit the sale of a wholesome commodity under such conditions that the claim of possible fraud cannot be urged to support the enactment.

The Supreme Court of Iowa recognized the force of this proposition and evidently hesitated somewhat for an answer. We submit that the one given in the opinion is illogical and not really an answer, but rather an avoidance of an obstacle which the court did not see fit to attempt to remove. The Iowa court said (Record, p. 18):

"It is said by defendants that they are deprived of the right to sell their product if it contains a less per cent of butter fat than that prescribed by the statute and that the sale of such is entirely prohibited. This, we think, is an assumption not warranted. They may sell it for what it really is. Possibly it would sell as readily if it is named and sold as frozen skim milk, if not, this would be an additional argument for prohibiting the sale of so-called ice cream made from evaporated skim milk as ice cream.

"The State contends that every point in this case is decided against the contentions of defendants in *State vs. Schlenker, supra*, and *State vs. Snow*, 92 Iowa, 642. They are very closely in point.

"The only case called to our attention in which the question of fixing a standard for ice cream was decided is *Righters vs. City of Atlanta*, 66 S. E., 991. In that case, under an ordinance, the prohibition was not against selling ice cream of less than the prescribed percentage, as ice cream, but against selling it at all. The provision of the ordinance is:

"Ice cream sold or kept for sale must contain at least 10% butter fat, for fruit ice cream, and 12% for plain ice cream."

"Under this ordinance, ice cream could not be sold or kept for sale unless it contained the required per cent of butter fat. As already stated, our statute does not prohibit the sale of such product. In the Georgia case, the court said:

"It might be permissible to say that the term 'ice cream' . . . should relate only to ice cream of a certain prescribed richness, and that whoever sold ice cream of poorer quality should either by calling it under some other name, or by inditing on the vessel in which it is delivered, or otherwise, disclose the inferiority of its quality."

"Thus recognizing the distinction which we make between that ordinance and our statute, and holding that the sale of ice cream may be regulated by fixing a standard. Our statute fixes a standard for ice cream and prohibits the sale of anything else as ice cream, but the sale of a product formerly known as ice cream, but containing a lower per cent of fat than that prescribed by the statute, is not prohibited. It may be sold for what it is. It may be sold under some other name and the consumer will not be deceived, for he now knows that when he buys ice cream he is getting an article containing a certain per cent of butter fat, and that this may not be so if he buys something not as ice cream but as something else." (Italian case.)

The Iowa Supreme Court assumes premises which do not exist. It attempts to make a distinction where there is really no distinction. It states that there is a substantial difference between forbidding the sale of the product ice cream as ice cream and absolutely prohibiting the sale of ice cream containing less than 12 per cent butter fat.

While the State may prohibit the sale of ice cream which contains any deleterious substance or is otherwise impure or unwholesome, it cannot arbitrarily prescribe that ice cream containing less than a certain percentage of butter fat shall not be sold as ice cream. The Court of Appeals of Georgia, in the case of *Richers vs. City of Atlanta*, 66 S. E. 991, said in part:

"Ice cream, however, is a luxury rather than a necessity. Still, since it is a foodstuff, the regulation of the sale of it, so far as is necessary for the prevention of impurities, adulterations, and other similar things likely to affect the health of those using it, is also within the police power of the city; and if this ordinance, so far as the sale of cream is concerned, had that end in view, the court should not declare it to be unreasonable or beyond the powers granted by the city charter. The complaint against the defendant's ice cream was not that it was impure or that it contained deleterious substances, or that it was likely to affect the public health, but that it was not rich enough in butter fat. The defendant, for the purpose of showing the invalidity of the ordinance as a health measure, offered to prove that the presence of this amount of butter fat was not essential to the ice cream's being healthful—that the ice cream he was selling was just as good, from a sanitary standpoint, as the ice cream of the character prescribed by the ordinance would be. This evidence was admissible. The rule is that where an ordinance is not passed by express authority of the legislature, the courts may inquire into its reasonableness, and to that end may hear testimony.

"It is plain, from the ordinance itself, however, that 10 per cent or 12 per cent of butter fat is not



essential to the wholesomeness of milk or of milk products, for, as to the milk itself, there is a prescribed percentage of 3.6 per cent of butter fats.

"Indeed, to state the matter with perfect fairness, the city does not really insist that the portion of the ordinance relating to the richness of ice cream was enacted for the protection of the public health, but rather insists that this part of the ordinance is valid as a measure for the protection of the members of the general public against being cheated by having ice cream of inferior value furnished them. It may be a serious question as to whether the provisions of the pure-food law of this State are not broad enough to take away from municipalities the right to prescribe standards of foodstuffs for the purpose of protecting the public health, but it will not be necessary to decide that point here.

"It will be noticed that under this ordinance the prohibition is not against selling ice cream of less than the prescribed percentage as ice cream, but against selling it at all. Though the seller distinctly informs the purchaser that the ice cream contains less butter fats than 10 per cent, the sale is unlawful, according to the ordinance. Even if the city has the power to prescribe that no ice cream of less than a certain percentage of richness in butter fats shall be sold as standard ice cream, it still would not have the power to say that ice cream below that standard should not be sold at all.

"For instance, it might be permissible to say that the term 'ice cream,' or 'standard ice cream,' or 'first-class ice cream,' should relate only to ice cream of a certain prescribed richness, and that whoever sold ice cream of poorer quality should either by calling it under some other name, or by indicating on the vessel in which it is delivered, or otherwise, disclose the inferiority of its quality. But under the ordinance before us, if a physician desired that a patient should have ice cream, but did not deem it safe for him to take the richer ice cream, it would be illegal for any one to furnish the grade of ice cream actually suited to the sick man's physical condition."

The suggestion of the court below—apparently made in all seriousness—is that if you make ice cream which has less than 12 per cent butter fat you can sell it, *but not as ice cream.*

Ice cream in which eggs are an ingredient is no longer ice cream, for eggs are not permitted by the statute, and this is true, though the finished product contains more than 12 per cent butter fat. Ice cream made of milk, cream and condensed milk containing between 9 and 10 per cent butter fat (which, though the record does not disclose it, is the fact as to the product in question, and the statute is equally applicable whether the product contains 11 or 4 per cent. of butter fat) is to be sold as "frozen skim milk." This is not our suggestion, but that of the court below, which holds: 1. That if a manufacturer uses an ingredient in addition to dairy cream, such as milk, condensed milk or eggs, his product cannot be sold as ice cream. 2. That regardless of the ingredients used, if the finished product contains less than 12 per cent butter fat it is not ice cream.

The court below says that statute does not prevent the sale of ice cream—it only prevents the sale of ice cream as ice cream. If you take ice cream and misbrand it and call it "frozen skim milk" or "frozen dainties" or some other name, not already in use for some other food substance, it is all right. This shows how far the court had to go in order to sustain this act. The court actually says: "Our statute fixes a standard for ice cream and prohibits the sale of anything else as ice cream, *but the sale of a product formerly known as ice cream*, but containing a lower per cent. of fat than that prescribed by the statute, is not prohibited. It may be sold for what it is." (Italics ours.) Well, what is it? It was ice cream; it is ice cream within the common knowledge; what has it become by legislative fiat? If the Legislature can select one formula for ice cream and the other ice creams are then sold for "frozen dainties," then the Legislature may standardize "frozen dainties." If then the public still demand the

product it may be sold as a "creamy ice," and so we could go on.

Recognition by the court below of the fact that the Legislature in fact selected but one formula of many and forbade the sale as ice cream of "a product formerly known as ice cream" demonstrates conclusively that the court reasoned in a circle. It assumed the validity of the statute in question, and reasoned that all other products which admittedly before the passage of the statute were ice cream had now ceased to be ice cream because the definition in the statute excluded them and that the statute prevented a fraud, which could not have occurred before the passage of the statute. *The State seeks by a statute to correct an evil created by the statute itself.*

It is true that this court will follow the construction placed upon the State statute by the highest court of the State (*Forsythe vs. Hammond*, 166 U. S., 506, 519), but the act in question must be judged by its natural effect and not by its proclaimed purpose, and this court may decline to concur in the view of the State court as to the real effect and operation of the statute.

*Soon Hing vs. Crowley*, 113 U. S., 703.

*Yick Wo vs. Hopkins*, 118 U. S., 356, 366.

*Railroad & Telephone Co. vs. Brand of Equalysis*,  
85 Fed. Rep., 302, 317.

Mr. Justice Pitney, writing for the court in *Coppage vs. Kansas*, (236 U. S., 1-15), said:

"But, when a party appeals to this court for the protection of rights secured to him by the Federal Constitution, the decision is not to depend upon the form of the State law, nor even upon its declared purpose, but rather upon its operation and effect as applied and enforced by the State; and upon these matters this court cannot, in the proper performance of its duty, yield its judgment to that of the State court. *St. Louis South Western R. Co. vs. Arkansas*, 236 U. S. 350, 362, ante, 265, 271, 35 Sup. Ct. Rep. 99, and cases cited."

The Iowa act as construed by the Iowa Supreme Court is virtually a prohibition of the sale of an admittedly wholesome article of food under its own name. We submit that the effect of this construction is to take away from manufacturers the right to sell their product and to say that they can sell it as something else gives them no privilege of value. Persons ask for "ice cream," not something else, and the situation is well within the principle of the case of *Collins vs. New Hampshire*, 171 U. S., 30.

If the statute permitted the sale of a product as ice cream, provided the ingredients used were named on the label or the amount of butter fat therein stated thereon, we would have a different case, a case which might come within the decision of this court in *Heath & Milligan Mfg. Co. vs. Wurst* 207 U. S., 338, where the court sustained a statute requiring labeling of mixed paints. In that case the manufacturer was not deprived of the privilege of selling his product as a mixed paint, but only required to label it when certain ingredients were used. We have no such case here. In this case we have an absolute prohibition of the use of any but certain ingredients and an absolute prohibition of the use of the name "ice cream" for products where any but the enumerated ingredients are used. *Under the statute, as construed by the Iowa Supreme Court, ice cream cannot be sold as ice cream even if the ingredients are stated on the label and their proportions set forth.*

In the Heath case there were a number of admissions made that certain ingredients were the customary ones and that the ingredients which the manufacturers proposed to use were new and in fact were substitutes for old and well-known ingredients. In this case we have no such admissions; no such state of facts.

If it could be shown that ice cream was originally made of cream of milk, sugar and a flavoring ingredient, or if it could be shown that at any time it had been the universal practice so to make ice cream either in the homes of the people or in

the trade, then these two cases would be parallel to the extent that it might be that labeling might be required and then be held that there is a reasonable basis for the contention that the purchaser of ice cream might reasonably expect the product delivered to contain some certain amount or percentage of milk fat. But it is impossible to show that, as it is not a fact. The facts of knowledge show plainly not only that the earliest ice creams were not so made, but also that time and changing customs and practices have never tended to limit the variety of ingredients used in ice cream, nor to fix proportions, but that, on the contrary, there has been a tendency, if not indeed a continuing effort, to widen variety in ice creams, to make new combinations, both as to the ingredients used and as to their proportions in the combination.

We have been able to find no authority and the State and court below have been unable to point to an authority to support the proposition that the legislature may forbid the sale of a wholesome food product under its own name, when the product is not an imitation of or a substitute for any other product, or that the Legislature may arbitrarily select one variety of a product and say that from that time on all other varieties of the same product shall cease to bear that name under which they have customarily been sold for over one hundred years.

Further, the statute in question is a purely arbitrary one and is a regulation without any reasonable basis in that, first, it excludes from use in the manufacture of ice cream ingredients which have always heretofore been used; second, that it arbitrarily establishes a percentage of butter fat by weight; and third, it establishes an arbitrary and unreasonable classification of ice cream.

In excluding milk, eggs, condensed milk and other wholesome ingredients the statute certainly is arbitrary. If the State can exclude these ingredients and permit cream only, it certainly could, in the same arbitrary man-

ner, forbid the use of cream and permit the use of milk and condensed milk only, or it might require the product to be made of milk and eggs only. Milk and eggs make a fine base for a high class ice cream. We submit that there is no basis for the selection of but *one* of the customary and usual ingredients to the exclusion of all others.

The Food Standard Commission of Illinois, the only State which attempted to make an investigation of the question, found and published in their official bulletin as follows:

"Ice cream is a frozen substance, made from cream, or milk and cream, and sugar, with or without the addition of such other wholesome substances as have customarily \* \* \* been used in making ice cream, and contains not less than eight per cent (8%) milk fat.

"\* \* \* The following other substances have customarily been used in making ice cream: Eggs, flours, starches, butter, gelatin, flavoring, harmless colors, nuts, fruits, pastries and condensed milks."

Why they put the "eight per cent" in the standard, no one knows, for the Commission's report states that their reasons were too lengthy to be placed in the report.

However, it is to be noted that the sale, under its own name, of ice cream containing less than eight per cent butter fat or otherwise failing to conform to this standard is not prohibited, for section 27 I of chapter 127 B of the Revised Statutes of Illinois, which enacts certain standards and authorizes the Food Standard Commission to promulgate standards, contains this proviso:

Provided, that nothing in this section shall be construed to prevent the sale of any wholesome food product which varies from such standards, if such article of food be labeled so as to clearly indicate such variation."

Ice cream is sold by the plate, pint, quart or gallon. It



is never sold by weight, yet the statute provides for a percentage test by weight.

Ice cream with the *same* percentage of fat may *vary* in *amount* of fat in a measured quantity and of course the public are only interested, if at all, in the *amount* of butter fat they receive.

That the *percentage* of butter fat of two or more ice creams may be the same, yet the *amount* of butter fat in each be different, can readily be shown. When the ingredients of ice cream are ready to be frozen, the manufacturer refers to it as "mix" or "mixture" and all mixtures are figured on a basis of the amount of ingredients necessary to make 10 gallons of the finished product. To make ten gallons of ice cream, some manufacturers use five gallons of mix, some use six gallons, some seven, some eight and others nine, and in the freezing process the mix, whether it be five, six, seven, eight or nine, is beaten up to make ten gallons or thereabouts. In fact, these variations as to amount of mix used are frequently made where the same manufacturer produces different kinds of ice cream.

It is right here that the difference arises. It is merely a question of how much mix is used to make the ten gallons which controls the *amount* of butter fat the consumer receives, and this, though the percentage by weight of butter fat may be the same or may vary according to the amount of swell obtained, that is, according to the amount of air which is incorporated into the product. So, if we assume that the various mixtures have the same weight per gallon, say 10 pounds, then take 5 gallons (50 lbs.) of 12 per cent mix to make 40 quarts of finished product, and the finished product will weigh 5 lbs. to the gallon and each gallon will contain .6 pound of butter fat.



Take 6 gals. of 12% mix  
 6 lbs. to gal. finished  
 12%

---

.72 lb. butter fat to gallon.

Take 7 gals. of 12% mix  
 7 lbs. to gal. finished  
 12%

---

.84 lb. butter fat to gallon.

Take 8 gals. of 12% mix  
 8 lbs. to gal. finished  
 12%

---

.96 lb. butter fat to gallon.

Take 9 gals. 12% mix—for very heavy ice cream.  
 9 lbs. to gal. finished  
 12%

---

1.08 lbs. of butter fat to gallon.

The above shows conclusively that a statement or declaration of the *percentage* of butter fat does not inform as to the *amount* of butter that a purchaser receives in his plate, pint, quart or gallon. So the percentage requirement is useless to the public.

Not only do ice creams with the same *percentage* contain different *amounts* of butter fat, but ice creams containing different *percentages* of butter fat may have practically the same *amount* of fat in a measured quantity.

Using the same weights as above, take 5 gallons (50 lbs.) of 12 per cent mix to make 40 quarts of finished product, and the finished product will weigh 5 lbs. to the gallon and each gallon will contain .6 lb. of butter fat.

Take 6 gals. of 11% mix  
 6 lbs. to gal. finished  
 11%

---

.66 lb. butter fat to gallon.

Take 7 gals. of 10% mix  
 7 lbs. to gal. finished  
 10%

---

.70 lb. butter fat to gallon.

Take 8 gals. of 9% mix  
 8 lbs. to gal. finished  
 9%

---

.72 lb. butter fat to gallon.

Take 9 gals. of 8% mix  
 9 lbs. to gal. finished  
 8%

---

.72 lb. butter fat to gallon.

Or where 9 gallons of 6 per cent mix are used to make 40 quarts of finished product the amount of fat to the gallon (.54 lb.) is within six one-hundredths of a pound of the amount of fat in a gallon of one kind of 12 per cent ice cream that is legal ice cream under this statute.

From the above we see that (1) while the requirement of the statute is strict as to 12 per cent of the whole mass being butter fat, a constituent of one of the permissible ingredients and not itself an ingredient, the volume or quantity of butter fat may vary at least as much as 50 per cent in a given volume or measure of the product, and a purchaser relying upon the false assurance of the law and in no wise

exercising the vigilance and right of choice he had been wont to exercise might easily be deceived and defrauded and the offender go unwhipped of the law; and (2) standard ice cream—that is to say the only product that may be sold as ice cream under this act—may safely be represented to the purchaser as superior to all other products heretofore commonly known and sold as ice cream, whereas it is common knowledge that there are products heretofore lawfully salable as ice cream that are in both intrinsic value and food value superior to such ice cream as may be sold as ice cream under this act.

On the other hand it makes no difference where the fat point is fixed, it is always possible to make a legal mix illegal by adding ingredients that *improve* it, as when eggs are added, or when to produce heavy body in the finished product without increasing materially the *amount* of fat in a measured quantity, extra milk is added to a batch to make a given quantity. In other words if we take five gallons of any mix to make 40 quarts of ice cream that will pass as legal ice cream under this statute and add to that 5 gallons of mix four gallons of whole milk and still produce but 40 quarts of finished product, we increase the amount of butter fat in each gallon, but the percentage of fat is so reduced as to make the product illegal under this act.

Or if to make 40 quarts of French ice cream we take all the materials to make 8 gallons of 12 per cent mix and add to them anywhere from 80 to 120 eggs (approximately 8 to 12 pounds) *we make a product that is illegal under this act, though it contains besides the eggs much more fat to the gallon than is necessary in another kind of ice cream that would pass as legal.*

A reasonable basis must be found for this regulation if it is to stand. What is the basis of this butter fat regulation? We have shown it does not show the *amount* of butter fat present and is not a measure of the *amount* of cream used, and it is not a measure of the value of ice cream as a food

or a confection, for the other milk solids, not fat, and other materials used are of as great, if not greater, food value; not a measure of its intrinsic value, for the amount of butter fat may vary even though the percentage is fixed; or eggs or other costly ingredients may be added and reduce the percentage, so that butter fat is not a measure of the cost of producing the article. It is not even an ingredient of ice cream, but merely one of the constituents of milk, cream and condensed milk, any or all of which may enter into ice cream in varying proportions and amounts. Why twelve per cent. any more than ten, and why not fourteen instead of twelve? The answer is that there is no basis whatever, but it is purely arbitrary; and it is also unreasonable, for we find that many kinds of ice cream do not contain twelve per cent. and are not made solely from cream; and being arbitrary and unreasonable, is, therefore, void as denying the equal protection of the law. A man is deprived of the privilege of selling his ice cream unless it complies with this arbitrary standard.

Now, we find that not only is this arbitrary and unreasonable regulation made but that ice cream is divided into two arbitrary classes, one of which does not contain fruit or nuts used as flavoring, and the other of which contains fruit or nuts used for flavoring. If you use fruits or nuts for flavoring you get an allowance of two points. Is this a health provision, or does it tend to prevent fraud? Has it any basis? If twelve per cent of butter fat is absolutely necessary in any other kind of ice cream, why is it not necessary in a fruit or nut ice cream? If two points are allowed for the addition of either fruit or nuts, why should not four points be allowed if both fruit and nuts are added? If a man adds either fruit or nuts, no matter how small the amount, he gets an allowance of two points, which allowance is also purely arbitrary. A man would have to add twenty per cent. of fruit or nuts to his mix to entitle him to any such allowance, and such an amount is seldom,

if ever, added. If it is said that the addition of fruit or nuts increases the weight and thus lowers the percentage of butter fat, so does the addition of eggs, the addition of ground macaroons to make *bisque* ice cream and numerous other additions to the mix which add to the weight as do fruit and nuts, and yet no allowance is made for such additions.

This is a purely arbitrary classification of ice cream.

That the classification, such as that made in this statute, is unlawful, see case of *People ex rel. Farrington vs. Menschling*, 187 N. Y., 8, where it is said:

"The classification must be such as in the nature of things suggests and furnishes a reason and justifies the making of the class. The reason must inhere in the subject matter, and must be natural and not artificial. Neither mere isolation nor arbitrary selection is proper classification (*G. C. & S. F. Ry. Co. vs. Ellis*, 165 U. S., 150; *Oetting vs. K. C. S. Co.*, 183 U. S., 79; *Connolly vs. U. S. P. Co.*, 184 U. S., 549; *Matter of Pell*, 171 N. Y., 48; *People vs. O. C. R. Co.*, 175 N. Y., 84; *Rohrstrat vs. People*, 185 Ill., 189; *People ex rel. McPike vs. Van De Carr*, 91 App. Div., 20; 178 N. Y., 425; *Wright vs. Hart*, 182 N. Y., 330; *People vs. Beattie*, 96 App. Div., 383; *People ex rel. Appel vs. Zimmerman*, 102 App. Div., 109)."

It was held in *Nichols vs. Ames*, 173 U. S., 509, 521, that:

"The question always is, when a classification is made, whether there is any reasonable ground for it, or whether it is only and simply arbitrary, based upon no real distinction and entirely unnatural. *Gulf, Colorado, etc., Railroad vs. Ellis*, 165 U. S., 150, 155; *Magnum vs. Illinois Trust & Savings Bank*, 170 U. S., 283, 294."

Further, it discriminates between dealers who manufacture ice cream without using fruit or nuts for flavoring and those who do use fruit or nuts for flavoring, thereby denying the

former the equal protection of the law. All recent United States Supreme Court decisions on this point are collected in *State vs. Mikulak*, 125 S. W., 565.

## PART V.

*The act in question does not tend to prevent fraud.*

The basis of the claim of the State is solely that the act is sustainable as tending to promote the general welfare, in that it tends to prevent fraud and deceit. That is, that it tends to prevent the sale for and as ice cream of what is not in fact ice cream. The decision of the lower court is based entirely on that proposition. The lower court in their opinion say:

"It is not claimed on either side, as we understood it, that the act in question is a health law. The claim of the State is that the purpose of the legislature was to prevent the perpetration of fraud upon the public" (*Record*, p. 13, lines 6-12).

It follows that if the act does not tend to prevent fraud it cannot be sustained, because the only ground on which it can stand fails.

The question, then, is, Does the statute tend to prevent fraud and deceit? An illustrating the reasoning applicable to this proposition, the *dismergence* cases, which are numerous, are somewhat illuminating. In the case of *People vs. Freeman*, 242 Ill., 973 (90 S. W., 565), the Illinois court state:

"It is argued that it is an unjust and unlawful discrimination, which the legislature has no power to make, to prohibit the use of *lactin* when coloring matter is *dismergence*, and at the same time permit its use in butter, the product of pure milk and cream, under the pretense that it is for the protection of the

public health. In this counsel mistake the purpose of the act. Aside from any effect upon the public health, the object of the act is not to prohibit or discriminate against the manufacture or sale of substitutes for butter, but to regulate such manufacture and sale so to protect the public against the sale, as butter, of a different article. With the sale, for what it is, of any substitute for butter, the law does not interfere. It is only the sale under pretence that the article sold is that which it is not that the law affects. But in *Frogie vs. Mars*, 99 N. Y., 377; 52 Am. Rep., 34; 2 N. E., 29, reversing 35 Hun., 529, a statute prohibiting not the manufacture or sale of an article designed as an imitation of dairy butter or cheese, or intended to be passed off as such, but of an article designed to take the place of dairy butter or cheese, was held void chiefly because it was construed to be an attempt on the part of the legislature to drive the manufactured article from the market, for the benefit of another industry, and to protect those engaged in the manufacture of dairy products against the competition of cheaper substitutes, capable of being applied to the same use; in other words, that the object of the statute was to prohibit one industry in order to foster another."

The *characteristic* cases have uniformly been based on the thought as above variously expressed, i. e., the question of substitution or imitation, the protection of the public against the liability to fraud or deceit, that is, the sale for better of what is not better in fact.

The most important of the *characteristic* cases are reviewed in the case of *Schulzinger vs. Penn.*, 171 U. S., 1, and *State vs. Hansen*, 136 N. W., 412.

The limit to which any *characteristic* case can be carried is that the legislature may prevent the sale of the substitute for a well-known article of food. Here such a principle has no application, for here the sale is not of a substitute for an article, but of the article itself.

This is well stated in *State vs. Lupton*, 61 So. W. Rep.,



171, where the court, referring to oleomargarine cases, says, at page 176:

"But the question raised on this record, while a kindred one, is, we conceive, different. It seems to us that, in the nature of things, there is a wide difference between legislation prohibiting or regulating the manufacture with a design to imitate a standard or superior article, and pass it off on the public, which cannot readily detect the imposition, for something different from what it is, and the manufacture and sale of an article which in truth and fact is admitted to be innocuous and healthful and in general use, and about which there is neither secrecy, nor imitation of another article of conceded purity and wholesomeness."

No case can be found that will sustain the contention that under the police power a legislature may forbid the sale of a wholesome product under its own name. The cases are all to the contrary. The most recent is *State vs. Hanson*, 136 N. W., 412, which holds flatly that a State cannot prohibit the manufacture and sale of a wholesome article of food.

The *Marr* case (*People vs. Marr*, 99 N. Y., 384) declared the New York oleomargarine act unconstitutional on the ground that it prohibited not the manufacture of an "imitation" of dairy butter, but of an article to "take the place of butter" (see pp. 383, 384). This case holds that the State cannot forbid the sale of a wholesome article of food under its own name and points out the danger of any such doctrine (p. 387). The court would not listen long to an argument to the effect that an act of legislature could prevent the sale of bread or cake, or that candy could not be sold unless it contained a certain amount of sugar, or was of a certain degree of sweetness; that sponge cake could not be sold unless a certain amount of flour were used for every pound of cake made.

It is also important to remember that if arbitrary regulations, such as that in question, are to be upheld the legisla-

ture may change them from time to time, so that 2 per cent ice cream may be "legal" under one set of regulations, while the next session might make 16 the required percentage. Either would have as much but no more basis than the present arbitrary 12 per cent.

It seems indisputable that in order to apply to the present case the theory of the oleomargarine cases it must be said that the purpose of the statute is to prevent the sale *for* ice cream of what in fact is *not* ice cream. Right here is the distinction. Does the statute have a tendency to prevent the substitution for ice cream of what is not ice cream?

What is ice cream? The State will say the statute on which this prosecution is based defines ice cream as "a frozen product from pure sweet cream containing not less than twelve per cent butter fat." We say that is a correct definition of but one kind of ice cream. It will be recollected that ice cream is not a natural product, but an artificial product, a combination of various substances, and that a correct definition thereof involves a correct apprehension of at least the common understanding of what is meant by the term "ice cream" as generally used. Can a legislative fiat make that true which as a matter of fact is not true? Suppose the legislature should attempt to define cake and say that cake was a mixture of flour and sugar and eggs and butter, containing a certain amount of flour, and not less than a certain percentage, by weight, of eggs, and providing that any person selling or having for sale cake not according to the standard should be guilty of a misdemeanor, and punished accordingly, on the theory that every purchaser of cake has a right to assume that cake is a certain kind of cake and that the dealer can lawfully deliver only that certain kind of cake. Defendant on such a proposition would say, "What is cake?" and the State would calmly point to the statutory definition and say "That is cake, because the statute has so defined it," regardless of the fact that cake is made in a thousand dif-

ferent ways, with ingredients in a thousand different proportions. The same might be true of soup, puddings or a hundred other compounded foods. We submit that legislative fiat cannot make that black which is white or white which is black; that the per cent of butter fat is not anywhere in the public mind a test of what is or what is not ice cream.

Judge McHenry in his opinion in the District Court of Iowa, in which he held the act in question unconstitutional, so held saying:

"If the legislature of Iowa can prescribe that ice cream shall contain 12 per cent of butter fat and prevent the sale of it without that ingredient they may equally provide that no baker shall sell cake unless it contains 20 per cent by actual weight of pure eggs to the pound of cake. They may also provide that no hotel keeper shall serve soup to his customers without 6 per cent of animal fat therein, and both the manufacturer and the purchaser would be bound by this act of the legislative body.

"A further discussion of this question which is so plainly and unequivocally beyond the power of the legislative body would be useless."

(Rec., pg. 6.)

Ice cream is eaten primarily as a luxury rather than a food. As a matter of fact, the preference or choice of the consumer rests more upon sweetness, richness and sugar and flavor than upon fat content or upon solid content; in other words, upon taste rather than upon exact knowledge of the percentage of one or more of the constituents.

We again quote from the opinion of Judge McHenry:

"Ice cream is not a natural food product, but a manufactured combination of other ingredients. To one man ice cream containing 12 per cent of butter fat might be beneficial and acceptable to his taste. To another man ice cream containing but 6 per cent of butter fat might be more suitable, and in both cases

it is a matter of common knowledge that it is a harmless food product not injurious to public health, morals and welfare. The State of Iowa might as well have said in defining ice cream that it shall have 10 per cent of actual weight of sugar."

(Record, pg. 6.)

When the court below points to the statutory definition contained in the very statute under which we are prosecuted, as establishing what ice cream is, the court is reasoning in a circle. The fact that the absurdity of requiring that ice cream as a product shall be true to a name that is hardly more definite than "soup," and certainly no more definite than "vegetable soup" or "cream" soup is indicated by the fact that different States have attempted to set up different standards. The State cites this as tending to show that the standard fixed is reasonable. What we claim is, that it shows that there is no commercial or natural standard whatever; that the purchaser when he buys ice cream has no reasonable right to assume that it contains any particular amount of butter fat where no representation as to butter fat content has been made by the dealer and no specification as to butter fat has been made by the purchaser. The attempt to claim that he has a right so to assume because the statute in question so fixed is like the argument referred to in the Wisconsin case, *State vs. Redman*, 114 N. W., 137 (14 L. R. A. (n s.), 234), as to reasonableness: "If it were true that all police regulations are legitimate which are reasonable and all are reasonable which the legislature so wills, the Constitution as to very much of the field of civil government would be of no use whatever." That sort of arguing is not reasoning, but simply assertion. The legitimate reasoning is this: If this statute is to be sustained on the theory of prevention of fraud or deceit, it must be because there is actually an imaginable liability to be deceived. The only imaginable possibility of deceit is that the purchaser might be imagined or assumed to have right to infer or ex-

pect, aside from the statute in controversy, that the name "ice cream" carries with it the assurance to the public mind of some particular percentage or amount of butter fat content. If not, there can be no possibility of deceit and the statute must fail. Now this, we say, is a question of fact which the court must determine. Not so, says the counsel for defendant in error, because the statute has saved you the trouble by defining it as "the frozen product made from pure wholesome sweet cream and sugar with or without flavoring and if desired the addition of not to exceed one per cent by weight of a harmless thickener and contains not less than twelve per cent by weight of milk fat and the acidity shall not exceed three-tenths of one per cent."

The whole case of the State *must* rest, we think, on this proposition: the State, by adopting as a test of ice cream that which was never before known in the trade and to the common understanding as such, has thus established as a fact that ice cream of a less butter fat content which before the enactment of the statute was known as ice cream and was ice cream, is now no longer ice cream in fact, and cannot be sold as ice cream, because such sale would tend to deceive and defraud the purchaser, who had a right to assume that he was getting the statutory article. The argument necessarily is that before the enactment of the statute such a sale would not be liable to deceive, because the purchaser would have no right to assume that the term "ice cream" implied 12 per cent or any other certain per cent of milk fat, but that after the enactment of the statute he would so infer. In other words, the statute itself creates the very possibility of deceit which it is intended to guard against.

To such an absurdity does the logic of the State inevitably lead. That is, before the enactment of the statute no possibility of deceit existed, because no purchaser had a right to infer that the term "ice cream" imported any specific proportion of milk fat. Hence no occasion existed for the protection of the public against an evil which could not occur. The

State, assuming the very point in controversy, seeks to sustain this statute as one enacted solely to prevent the possibility of deceit. Then, necessarily admitting (if our proposition of fact is true, i. e., that the term "ice cream" had never imported any specific per cent of milk fat or that the product is made only of dairy cream), that no possibility of deceit previously existed, it contends that the possibility of deceit does *now* exist because it has been created by the very statute in controversy. This position not only begs the very question in controversy, but seeks to sustain the statute upon a ground which did not exist.

The oleomargarine cases are not parallel. The oleomargarine statutes were sustained as preventing the possibility of deceit by the sale of oleomargarine *as* and *for* butter. But this possibility of deceit necessarily had existed before the enactment of the statute, since natural butter was a well-known and well-established article of trade and the oleomargarine manufacturer evidently *might* impose on the public by selling oleomargarine, an imitation of or a substitute for butter, *as* and *for* butter. The evil to be provided against existed *before* the oleomargarine statutes were enacted and was not, as in the *instant* case, created by the statute itself. There was no question of identity of name or of substance between butter and oleomargarine and no attempt to exclude from classification as butter what had previously been known as butter. The oleomargarine statutes treated of a condition actually existing and did not attempt to create the very condition against which the legislation was presumably directed. The distinction is clear. A statute enacted under the police power must be sustained, if at all, by a condition really existing before the law was enacted and not by a condition created by the law.

Another class of cases which have been cited are the milk-standard cases.

The milk-standard cases are not in point, for we find that milk has been standardized because it is a natural product,

the adulteration of which is such a simple matter. Milk has always been composed of the same constituents, though in different breeds and different animals of the same breed the proportion of these constituents may vary to some extent. Notwithstanding the known fact of this variation in the milk of different cows—not a variation in the kind and number of constituents but in their relative proportions—it was deemed necessary, milk being among the necessities of life, to standardize milk, as a health measure, and to prevent fraud in a common necessity of life; in other words, to prevent the adulteration of a natural product. This distinction is clearly pointed out in *Rigbers vs. City of Atlanta*, 66 So. Eastern, 991, where the court contrasts milk with ice cream. Ice cream is not a natural product; it is a manufactured product, a complex compound without well-defined limits as to the variety or number of ingredients and without fixed proportions for such ingredients as may be used. On the other hand, milk, as has been pointed out, always has the same kind and number of constituents, the amount of which—not of one but of all—have been fixed for legal milk by standards based on the fair average of thousands of tests.

This question of milk standards and the oleomargarine cases is considered in the case of *People vs. Biesecker*, 169 N. Y., 53, where, at page 57, Chief Justice Cullen says, after considering the cases:

“From these cases the following propositions may be deduced: 1. That the Legislature cannot forbid or wholly prevent the sale of a wholesome article of food. 2. That legislation intended and reasonably adapted to prevent an article being manufactured in imitation or semblance of a well-known article in common use and thus imposing upon consumers or purchasers is valid. 3. That in the interest of public health the Legislature may declare articles of food not complying with a specified standard, unwholesome and forbid their sale. Though these principles, like most legal principles, are true only within limits,



there would not seem much chance of conflict in their practical application, except between the first and last. In the first of the milk cases (*People vs. Cipperly*, 101 N. Y., 634, decided upon opinion of Learner, P. J., in 37 Hun., 319) it was held that the statutory declaration of what was wholesome milk was conclusive, and the defendant was not allowed to show in defense that the milk sold by him was in fact unadulterated and not unwholesome. The first oleomargarine case can be differentiated from this on the ground that the statute forbade its sale as a substitute to take the place of butter and not as an unwholesome article of food. Still, that distinction is narrow and I imagine that the sale and consumption of a well-known article of food or a product conclusively shown to be wholesome, could not be forbidden by the Legislature even though it assumed to enact the law in the interest of public health. The limits of the police power must necessarily depend in many instances on the common knowledge of the times. An enactment of a standard of purity of an article of food, failing to comply with which the sale of the article is illegal, to be valid must be within reasonable limits and not of such a character as to practically prohibit the manufacture or sale of that which as a matter of common knowledge, is good and wholesome."

The case of *State vs. Snow*, 81 Iowa, 642, referred to by the court below as being "closely in point" (p. 18, Rec.), is, we respectfully submit, not in point at all.

This case involved a labelling question—it dealt with *imitations* of, or *substitutes* for, lard, and not with fats in general. The Legislature has not the power to define fat as lard, and to make it a misdemeanor to sell as fat any other fat than pure lard. In the common knowledge there are many kinds of fat suitable to be used as food besides lard. So there is common knowledge that there are many kinds of wholesome ice cream besides the particular kind described in the statute. In the *Snow* case the statute provided that *imitations* of lard must be appropriately labeled;

the statute in question forbids the sale of a product under its own name unless it is made in a certain way, regardless of what label is placed thereon.

In the Snow case the court pointed out that there was a difference between a case (such as this ice cream case) where the sale of an article under its own name is forbidden and a case (Snow case) where such sale is not forbidden, but the act merely required a label so that the public might know that they were getting not lard, as defined by the dictionaries, but an imitation of or substitute for lard. On this ground the Lard act was held constitutional. Our case, however, comes within the doctrine of *People vs. Marx*, 99 N. Y., 377, cited with approval in the Snow case. It cannot be held that one ice cream made by a formula that has been in use for many years and is ice cream within the definitions of the dictionaries and within common knowledge is an *imitation* of or *substitute* for another ice cream, and for this reason the doctrine of the Snow case does not and cannot apply.

Another case cited by the State is *Schmidinger vs. Chicago*, 226 U. S., 578. This was a weight and measure case. We do not contend that when we sell a pint or a quart of ice cream it does not have to be a full pint or full quart. We agree with the State that honest weights and measures are desirable and that laws requiring such honest weights and measures are within the police power. The *Schmidinger* case merely holds that an ordinance standardizing the weight of loaves of bread and providing for proper labels, is constitutional.

The ordinance considered in the *Schmidinger* case, did not attempt to define "bread," but merely regulated the weight of loaves of *any and every kind of bread*. It did not require that bread should be of a certain quality, or that it should contain a certain percentage of wheat flour or any other ingredient or constituent or that the name "bread" should apply only to wheaten bread and that rye or graham bread should not thereafter be sold as bread. If it had done

this, then the case would have been in point, but then the ordinance would unquestionably have been held unconstitutional.

Our reasoning above is evidently based upon the proposition that as a matter of fact and common knowledge, previous to the enactment of the statute in controversy at least, the term ice cream did not to the common understanding and in the common and usual acceptance of the term import any specific proportion of milk fat. We have discussed this particular question as to what ice cream is and what the term imports to the common understanding and in the common and usual understanding of the term under the heads of Points III and IV above. Our position is that ice cream is a generic term applied to an admittedly wholesome product which has been sold under its own name for a hundred years and that since the name has never imported any specific amount of butter fat content its sale under its own name could not in the nature of things tend to promote fraud as to said butter fat content. This, of course, involves a question of fact which the court must determine.

Professor Freund, of the Chicago University, a well-known text-book writer on "Police Power," in an article entitled "Problems of Police Power," in the October, 1913, number of *Case and Comment*, page 304, speaking of the difficulty of classifications of this sort by courts remarks:

"The reason for this failure is tolerably clear. The legitimacy or illegitimacy of classification can be established only on the basis of social or economic data of great complexity. It presents a question of fact for the examination of which the courts are not equipped. It is always a condition as well as a theory which underlies public welfare legislation; and while the courts can deal adequately with the theory, the condition must elude them unless it is notorious, and at present the causes of social or economic grievances are rarely notorious."

This author recommends the superior efficiency of commissions in the determination of questions of fact of this sort. The difficulty is perhaps enhanced in a case like the one at bar by the fact that in the investigation of conditions governing a great industry of recent development, like the ice cream business, sufficient time has not elapsed for the production of standard text books on the subject to which the court could conveniently refer for a determination of the facts of general knowledge on the subject; but the information from which judicial notice must be derived is chiefly contained as yet in technical magazines, lectures, and the expressions of those whose experience enables them to speak with authority.

How a superficial glance at some of the so-called authorities submitted by the State may mislead a court is shown by the fact that the court below discusses three formulas which are taken from a muck-raking magazine and refer to "the man" and other indefinite persons as authority. In all of these formulas costs are set down for materials only; but the court seems to have accepted the figures as the total cost of manufacturing the several kinds of ice cream. If in each case a reasonable cost of thirty cents a gallon is added for manufacture, selling, etc., the difference in price does not seem as great and it is a fact that the cost per gallon of manufacturing and handling would be about the same in each of the three cases. Moreover, the formulas are all faked.

Formula No. 1 contains 19.5 per cent butter fat, not 20 per cent. It contains 4.14 per cent of milk solids not fat, 9 pounds of sugar and 9.96 pounds of milk fat; a total of 23.10 pounds total solids, or 45.2 per cent solids. It certainly would be exceptional to find an ice cream containing even 40 per cent total solids, and it is highly improbable that ice cream containing 45.2 per cent total solids has ever been made, commercially or otherwise.

Formula No. 2 contains 7.94 per cent butter fat, instead of  $7\frac{1}{2}$  per cent. It contains 4.79 pounds milk solids not fat, 7.5 pounds of sugar, .25 pounds of gelatine and 4.04

pounds of milk fat; making a total of 16.50 pounds total solids, which is 22.6 per cent of total solids. While the first formula has never been made, the second formula is low, both as to fat and as to solids not fat, as compared with the great bulk of commercial ice cream, which runs about 35 per cent total solids.

Formula No. 3 is an absolute fake. It contains 1.31 per cent milk fat, 27.10 pounds milk solids not fat, 4 pounds of gelatine, 60 pounds of sugar, 9.83 pounds of milk fat; a total of 100.20 pounds total solids, equal to 13.60 per cent of total solids. No such formula was ever good commercially, as the product would be an extremely poor grade of hockey puck, so poor, in fact, as to be unmarketable as hockey puck. It is a faked up formula intended to show something that might be called ice cream. Fully 60 gallons of water would have to be left out to make a product with body enough and sweet enough to be saleable as a rather poor hockey puck. The flavor of the prize figure commercially would be a cheap imitation flavor and it would be practically impossible to expand this mixture to 120 gallons; the most that could possibly be gotten with a rapidly driven freezer would be about 60 gallons instead of 120.

The court below seems to have based heavily on these alleged formulas for ice cream as pointing to the necessity for employing the police power of the State to prevent the sale of cheap ice cream as and for a more costly and possibly better ice cream. To do this the court below assumed that all ice cream—regardless of kind or quality—is or might be sold at the same price, whereas as a matter of fact the price of ice cream, as of all other products, is controlled by competition, and the price at which ice cream sells varies as widely as do the varieties of the product. It is true that one manufacturer may be selling an ice cream containing less butter fat than that of another manufacturer, either at the same or even a higher price. But this does not necessarily or even probably involve misrepresentation. There

are many factors other than those set up as values of materials that influence, and properly, a manufacturer in fixing his price, and even the materials might not use manufacturers considerably more or less than they use another manufacturer for the same volume of its output containing the same percentage of better fat. Considering all these factors to be equal in all cases—a most violent assumption—it still cannot be held that it is a fraud for one manufacturer to demand and to receive a higher price for his product than another manufacturer demands and receives, nor is it a fraud for a manufacturer to demand and receive for his less costly product as high a price as another manufacturer gets for his more costly product, so long as he makes no compromise, nor as to the quality of his product or as to any of its merits for demanding his price.

We purchase easily for \$1.00 per pound, and we demand likewise we can purchase easily containing the same or even more and better materials for sixty cents per pound? Is nothing but one kind of easily—cheapest means. A manufacturer may use a high-priced American coating and his output may contain 90 per cent or more of sugar, and yet his product may not bring him as high a price as that received by a manufacturer who uses a lower-priced coating and its output does 90 per cent of sugar in its output. Is this an argument for preventing the sale, for sale of "cheapest means," of products containing less than 90 per cent of sugar? Yet it is the argument of the State—the argument which seems to have impressed the court below.

We repeat: the price for which the product sells is immaterial, it is not an argument, unless the quality and price of all ingredients, the cost of materials, the cost of sugar, are all laid to duties, together with the sales price of the product. In such situation a case presented.

This court can determine as a fact just what the term "cheapest means" means and how it is commonly used. Is it doing it

can take judicial notice of "all those matters and things which are of common knowledge and understanding."

(Opinion Judge McHenry, Record, pg. 5.)

This court has already taken judicial notice of the ordinary operation of an ice cream freezer (*Brown vs. Piper*, 91 U. S., 37).

This court in the recent case of *Muller vs. State of Oregon*, 208 U. S., 412, discussing the question of the judicial cognizance of the court and methods of acquiring knowledge on that subject, said:

"In patent cases counsel are apt to open the argument with a discussion of the state of the art. It may not be amiss in the present case, before examining the constitutional question to notice the course of legislation *as well as expressions of opinion from other than judicial sources*. In the brief filed by Mr. Louis D. Brandeis, for the defendant in error, is a very copious collection of all these matters, an epitome of which is found in the margin. \* \* \*

The legislation and opinions referred to in the margin may not be technically speaking authorities, and in them is little or no discussion of the constitutional question presented to us for determination, yet they are significant of a widespread belief that woman's physical structure, and the functions she performs in consequence thereof, justify special legislation restricting or qualifying the conditions under which she should be permitted to toil. Constitutional questions, it is true, are not settled by even a consensus of present public opinion, for it is the peculiar value of a written Constitution that it places in unchanging form limitations upon legislative action, and thus gives a permanence and stability to popular government which otherwise would be lacking. At the same time, when a question of fact is debated and debatable, and the extent to which a special constitutional limitation goes is *affected by the truth in respect to that fact*, a widespread and long-continued belief concerning it is worthy of consideration. We take judicial cognizance of all matters of general knowledge.

"



In that case the Supreme Court appends to the opinion a foot note containing a list of miscellaneous publications on the subject, giving information on the subject under discussion.

Not to repeat what we have already said under Point III as to the true meaning of the term "ice cream" we feel that we have demonstrated that from the beginning, and always, ice cream has been made from all sorts of varying mixtures and combinations to suit the taste of the consumer, and in no case has the proportional content of butter fat been regarded as a test of the appropriateness of the application of the term "ice cream" as a name for the product.

In brief our argument is that this enactment if sustained, must be sustained solely as tending to prevent fraud and deceit; that if so sustained, it must be sustained on the basis of the real *situation as it existed before the enactment of the statute*, and not on the basis of a situation created by the statute itself, and that since the incontrovertible facts of common knowledge on this subject absolutely negative the possibility that any purchaser of ice cream could have been misled by the term "ice cream" into assuming that the name implied any particular proportionate butter-fat content, or that the product was made of dairy cream alone, it necessarily follows that no fraud was possible and hence the law cannot be sustained as a police measure tending to prevent fraud and deceit.

## POINT VI.

*If a standard for ice cream could be enacted under the police power nevertheless the sale of ice cream as ice cream which did not conform to such standard could not under the police power be absolutely prohibited.*

The act as construed by the Iowa Supreme Court absolutely prohibits the sale of the "product heretofore known as ice cream" as ice cream. This is in effect an absolute prohibition of its sale.

The Iowa court missed the point made by the Georgia court in the Rigbers case. In the Rigbers case the court pointed out that while it might be possible to enact a "Standard Ice Cream"—to say that products sold as such standard ice cream should be of certain ingredients and quality—it could not prevent the sale of *ice cream as ice cream* provided it was properly labeled. In other words the State might enact a standard for a product and require all other products sold under the same name but varying from the standard to be labeled. (*Heath & Milligan Co. vs. Worst*, 207 U. S. 338).

Here the ice cream manufacturer cannot sell his ice cream as ice cream *even if he puts a label on it stating all the ingredients used and the amount of each ingredient and the resultant amount of butter fat therein.*

In the *Coppage vs. Kansas* case it is said:

"But, in our opinion, the 14th Amendment debars the states from striking down personal liberty or property rights, or materially restricting their normal exercise, excepting *so far as may be incidentally necessary for the accomplishment of some other and paramount object, and one that concerns the public welfare.* The mere restriction of liberty or of property rights cannot of itself be denominated 'public welfare,' and treated as a legitimate object of the police power; for such restriction is the very thing that is inhibited by the Amendment." (*Italics ours.*)

We think it is significant that Mr. Justice McKenna, in the *Heath & Milligan Co. vs. Worst* case, closed his opinion with these words:

*"And it must be borne in mind that the use of the non-enumerated ingredients is not forbidden nor the advantages of the practical tests and scientific research made by appellants taken away from them. The sole prohibition of the statute is that those ingredients shall not be used without a specific declaration that they are used—a burden maybe, but irremediable by the courts—maybe, inevitable, in legislation directed against the adulteration of articles or to secure a true representation of their character or composition."* (Italics ours.)

We submit that this legislation having no relation to the public health or public welfare—enacted solely because of the mistaken notion that it would, by compelling ice cream manufacturers to use cream only, make a market and secure a high price to the farmer for that product, whereas in reality it would destroy the market for ice cream and thus injure the farmer—has gone beyond mere regulation which is the limit to which the police power extends even if we assume that the sale of ice cream could be regulated by a statute requiring labeling as to ingredients.

The business of manufacturing ice cream is a useful occupation not affected with any public interest and can only be regulated by virtue of the police power and then can only be reasonably regulated. *Murphy vs. California*, 225 U. S. 623.

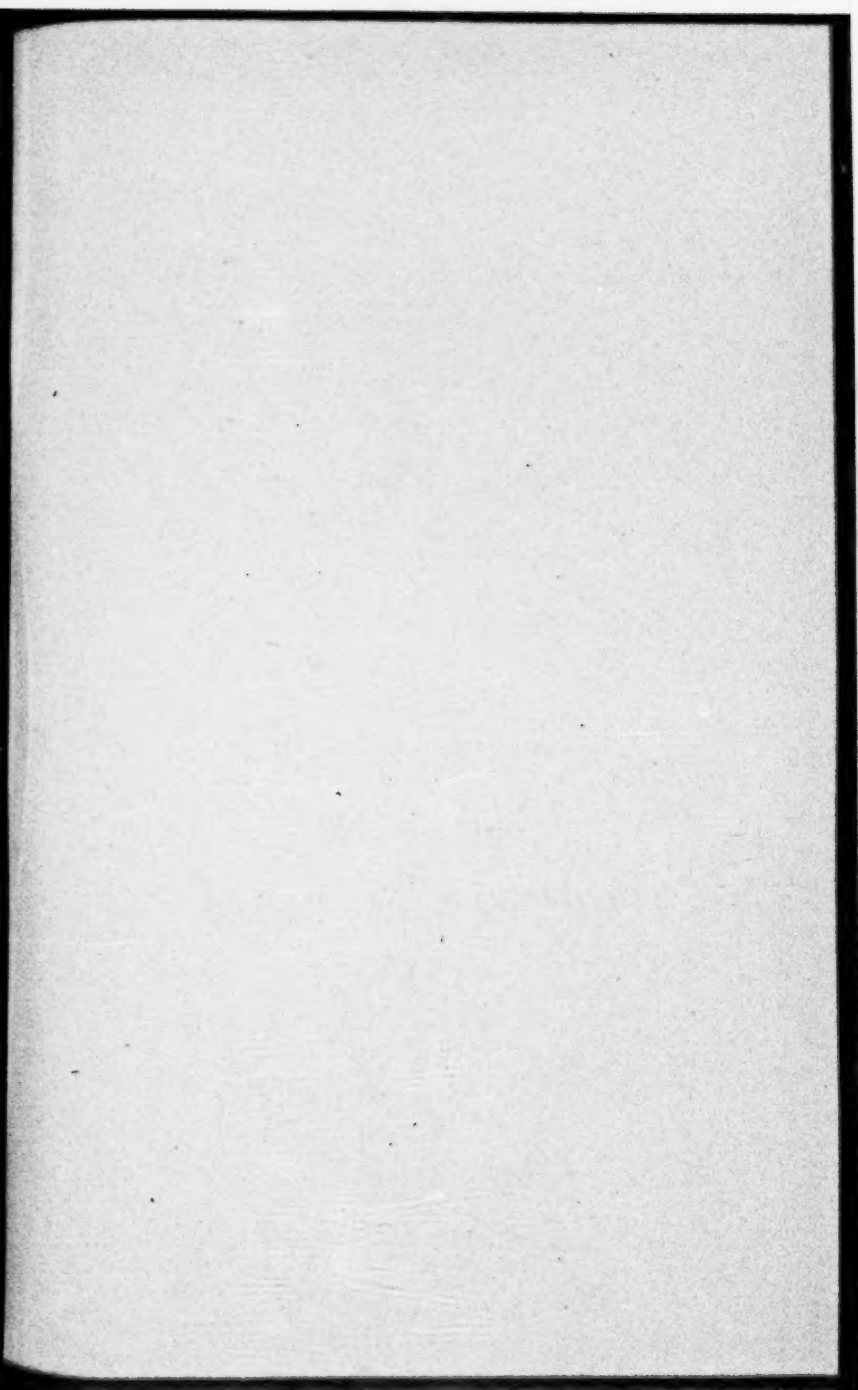
The power to regulate industry for the public good was never intended to be used to restrain and destroy a lawful business. The legislature may not restrict or prohibit traffic in wholesome food products under the mere pretense of regulating it. The court will look, as it said in the *Lochner* case, at the real motive for which the statute is passed as well as considering the real effect of the statute as enacted, and where, as here, there is no reasonably apparent need for regulation for the public good, and where,

as here, the act has gone beyond regulation, beyond what would be reasonably designed to prevent the sale of one product for another or to prevent misrepresentations in regard to the nature of a product, the court should, we submit, protect the interests of the industry affected by declaring the act in question unconstitutional.

**Lastly.**

We submit that the decree of the Supreme Court of the State of Iowa must be reversed.

WALTER JEFFREYS CARLIN,  
R. L. PARRISH,  
*Counsel.*



Office Supreme Court, U. S.

FILED

OCT 4 1916

JAMES D. MAHER

CLERK

**SUPREME COURT OF THE UNITED STATES.**

**OCTOBER TERM, 1915.**

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**No.  40**

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**THE HUTCHINSON ICE CREAM COMPANY ET AL.,  
PLAINTIFFS IN ERROR,**

*v/s.*

**THE STATE OF IOWA.**

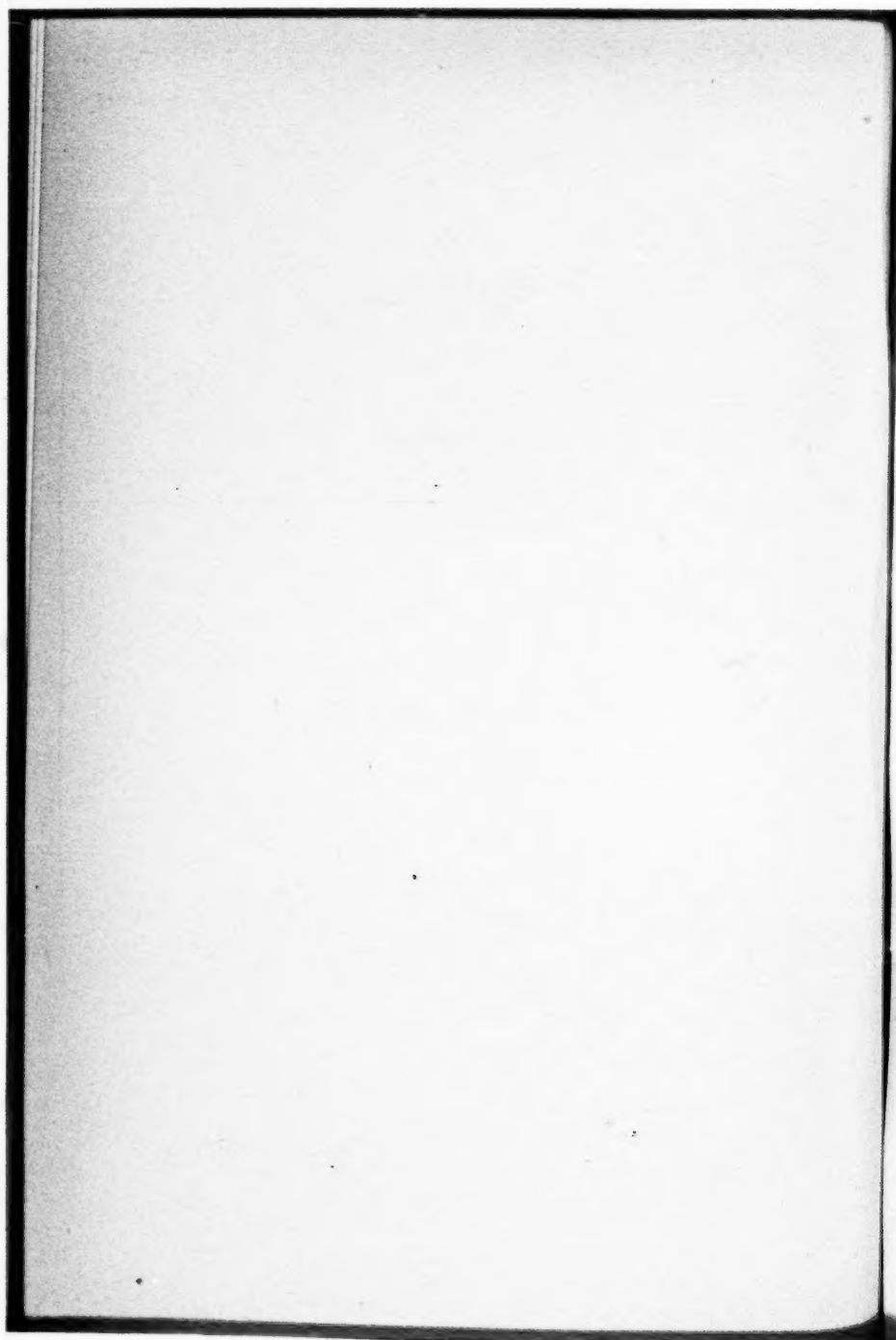
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**APPENDIX TO BRIEF OF PLAINTIFFS IN ERROR.**

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**WALTER JEFFREYS CARLIN,**  
*Counsel for Plaintiffs in Error.*

**(24,354)**





BRIEF

ON THE

History and the Present Meaning

OF THE

Term ICE CREAM

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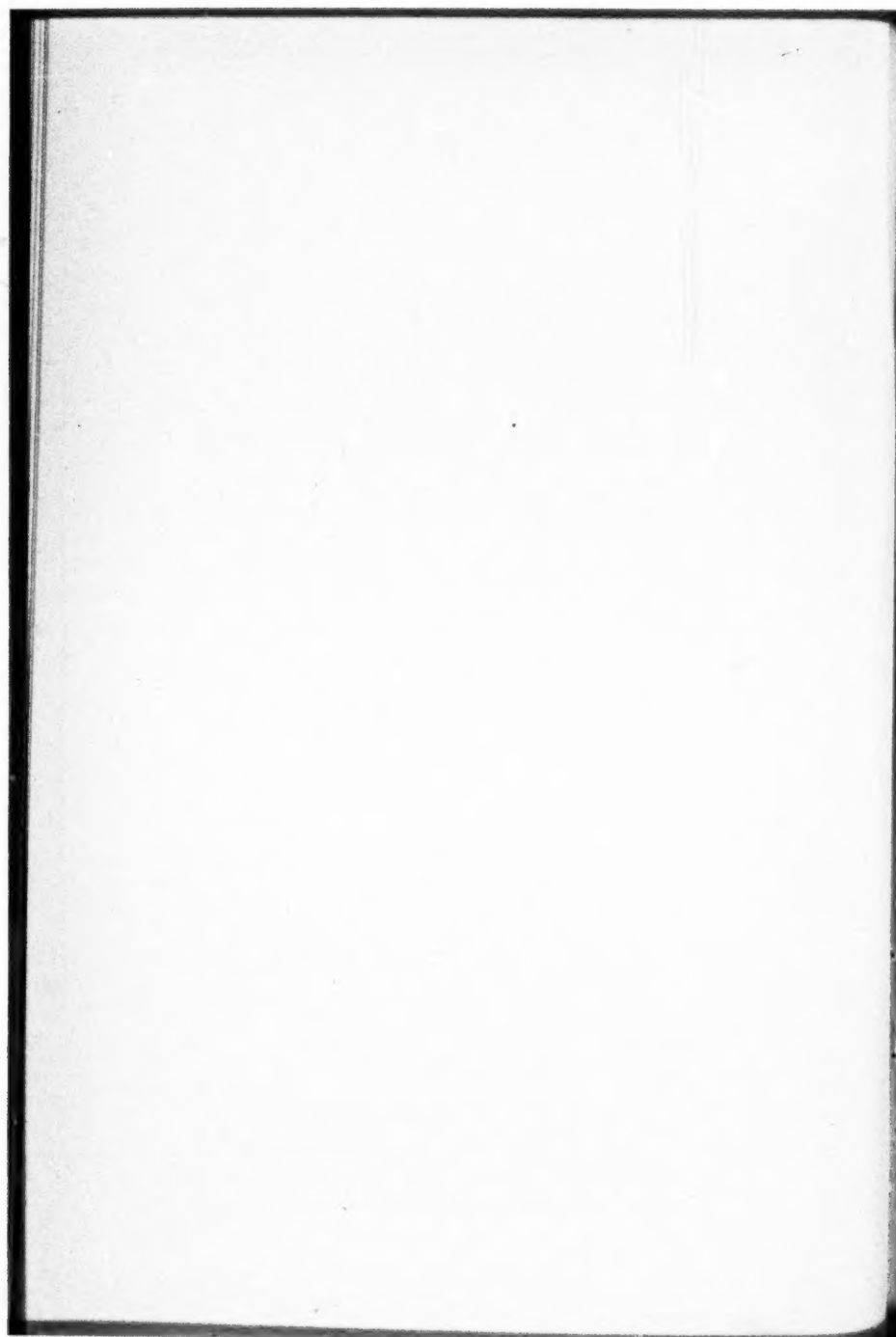
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## BRIEF ON THE HISTORY AND PRESENT MEANING OF THE TERM "ICE CREAM."

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### 1. PURPOSE.

1. 1. The purpose of this brief is:

- (a) to trace the history of the term *ice cream*;
- (b) to determine its former and present meaning;
- (c) to frame a definition of its present use.

1. 2. Such an inquiry is necessary, for incorrect decisions are made as to the meaning even of words so simple and even by persons in authority, owing to ignorance of the facts of language, incomplete knowledge of facts in the individual case, neglect of those facts though known, or prejudice, due to some *ex parte* consideration.

1. 3. Typical errors are as follows:

1. 31. A modern use of a term is recognized and an older ruled out.

As if it were ruled that the word *currants* must be held only to mean the common garden fruit, and the original sense of "raisins" excluded.

1. 32. An older sense is recognized and a modern sense excluded.

As if *corn* were ruled to mean "grain in general" only, and not specifically maize in American use, wheat in South Britain, oats in North Britain and Ireland.

Or as if *barn* were held inadmissible in the sense "car barn," and admissible only in the sense of a structure for sheltering farm animals and storing farm products—a method of decision that, pushed to its logical extreme, would confine *barn* to a place for storing barley.

1. 33. The meaning of a word is in question, not because it is applied to different things or the same thing in markedly different uses, as in the previous cases, but because, as a class-term it includes a variety of different kinds of the thing it denotes, and it is necessary to determine the limits of that inclusion. In default of, or in despite of, historic and other evidence, judgment is rendered by arbitrarily referring to what is assumed to be the "apparent" or "obvious" or "accepted" or "original" or "physical" sense of the term, in place of determining the word's real meaning and use.

As if a question arose whether a new explosive, differing only in the use of another salt than saltpetre, had a right to be called *gunpowder*. The referee notes that it can only be manufactured in quarter-inch cubes, and affirms that as the word *gunpowder* calls for a powder, the new explosive cannot be called by that name—

thereby leaving out of account the whole history of gunpowder and the facts as to its present manufacture.

Or as if a referee should rule that plum-pudding must be made of plums, or that soda-water must be made of soda, or that biscuit must be twice-cooked, and the like.

1. 34. In a case similar to the last, judgment is rendered for *ex parte* reasons, which, whether well-intentioned or not, have nothing to do with the matter.

As if it should be ruled that the term *gunpowder* should apply only to gunpowder sold in particular tins of a kind favored by foreign buyers, or that the term *cake* should not apply to certain forms of cake as being too simple, or to other forms as being too rich.

1. 35. The examples given of erroneous decisions are purposely made obvious. But the danger of using such erroneous methods of decision in cases not so obvious is ever present, even among well-informed persons.

In the particular case in hand, the definition of *ice cream*, there is danger of committing the errors described under 1. 34, 1. 35.

These errors have been committed.

It has been asserted (cf. 1. 34) that *cream* in the compound *ice cream* means the oily part of milk, which it does not mean, did not mean when the compound was adopted in English, and has never meant since.

Further (cf. 1. 35), it has been asserted that use of the term should be limited to the confection as made with cream (in that sense) alone—ostensibly for the interests of the public, but in violation of the true meaning, and, it may be added, plainly to the prejudice of the public interest, if due consideration is given the pertinent facts.

1. 4. The only method possible of determining accurately the definition of a word is to review the history of its use from its origin to the present, and to take into account all the necessary facts relating to the thing it denotes in the past and at the present.

This is essential, whatever the difficulty, or however incomplete or confused the historic record. In the present case, the task is not difficult and the record is not incomplete or confused.

1. 41. Sources of information are:

(a) Standard dictionaries and encyclopedias, the definitions and statements in which represent interpretations of the historic record by experts.

(b) The historic record itself with a view of submitting a wider range of evidence, substantiating or correcting the findings of standard authorities, and carrying the final definition to fuller detail than is possible in the limited space available in works of reference.

(c) Evidence as to the present usage of the word and present practice as regards the thing it denotes derived from actual life.

1. 5. The inquiry falls into the following divisions:

(a) The history of the confection called *ice* or *ice cream* (2).

(b) The history of the term (3).

(c) Present meaning and inclusion, summarized in a definition (4).

## 2. HISTORY OF THE USE OF ICE CREAM.

2. 1. The use of snow and ice for preserving and chilling food and drink goes back to an indefinite antiquity. Iced beverages—wines or various fruit mixtures—have probably been used in Southern Europe without intermission from classical times to the present. The Oriental sherbet was known in the 16th century. The class of sweets known as “creams” were served chilled before the practice of freezing came in.

2. 2. The art of making solid or semi-solid sweets by freezing could not develop systematically before freezing mixtures of ice and saltpetre or common salt came into use for this purpose. Such freezing mixtures were early known—Bacon, for example, refers to them familiarly in his *Sylva Sylvarum* 1627—but this application of them was not, so far as the record shows, known to France before 1660 or England before the 18th century.

2. 3. *Italy*.—The art of making frozen confections originated in Italy. The date is uncertain. Earlier than elsewhere in Europe, cookery was there taken seriously, and processes and recipes were jealously guarded, so that the publication of cookery books does not appear until a late period. It is sometimes asserted, without authority, that the cooks of Catherine di Medici brought the use of ices with them to France in the 16th century, but the first certain knowledge of Italian ices comes with their introduction into France after the middle of the 17th century.

When information concerning Italian ices becomes available, the same wide range of mixtures appears, including water-mixtures and cream-mixtures, as appears earlier in the French and English record. As in France and England, these mixtures are used unfrozen and frozen. Typical of Italy is the extensive use of partly frozen beverages, especially lemonades, served in glasses at social gatherings like our mousse, or obtainable at the *caffè*. Lemonades so frozen are, in some parts, notably Sicily, often taken in place of morning coffee, during the summer.

The influence of Italy in devising new recipes, and new decorative features, has continued to the present day. This appears in the repute of Italian ices throughout Europe, the vogue of Italian confectioners in foreign countries, and continuous references in titles of and recipes in books on the making of sweets and desserts.

2. 4. *France*.—France learned from Italy to consider cooking as a fine art. Montaigne (*Essai LI*) records his amusement at hearing a “clerk of the kitchen” discourse gravely on the subtleties of his profession.

The introduction of ices into France, or their general use, dates from the establishment of the Café Procope, about the year 1660, by an Italian from Palermo (sometimes said, on less authority, to have come from Florence), named Procopio Cultelli or Coltelli. This café became noted for its ices. Incidentally, the son of the founder, M. Coltelli, known as Procope Conteau, 1684-1753, won



distinction as a physician and dramatic author. Much later Tortoni's (also established by an Italian) became famous in like fashion.

The historic record in France is both earlier and more abundant than in Italy. It shows clearly that the new fashion from Italy was less an impartation of new recipes than of a new process—what was learned was the application of this new process to beverages and desserts already long established in French use. (See 3.)

2. 5. *England*.—The influence of France upon England in respect to fashions in clothes and cookery is not a modern thing—though in the 18th century, and still more in the 17th, Paris was not the absolute arbiter that she became during the 19th. Italian influence upon clothes and manners became a scandal in the latter part of the 16th century, but this, with any other inclination to ape foreign customs, disappeared in the 17th century under Puritan influence. With the Restoration, French fashions were brought back by the English Royalists returned from France. A wave of moral reform followed, supported by the throne under William and Mary, but this did not lead to any effective hostility towards foreign fashions in such matters as clothes and cookery. French influence upon cookery is abundantly manifest in the number of cook-books from French originals during the 18th century.

How early the use of ices came into England cannot be determined with precision. Large private establishments might have had French cooks or have used French methods or recipes, without their becoming generally known—and a special practice might for some time become general before evidence of it would appear in letters, diaries, plays, fiction, or in cook-books. The earliest reference to ices yet found occurs in a letter of Lady Mary Wortley Montague written on October 1, 1716, to "Lady X—," "The company are entertained with ice in several forms, winter and summer." She writes from Vienna to a friend in England, who, it will be seen, is assumed to know what "ice" is. The use of ices in England may safely be assumed, to a limited extent, if not generally, in the first half of the 18th century. This assumption is confirmed by the date 1769, of the earliest use found of *ice cream*, in Mrs. Raffald's *English Housekeeper* (see Appendix 2B) where the manner in which the process of freezing is described proves that it was not a novel and unfamiliar thing.

While the use of creams as sweets has been common in England from the 15th century to the present day, the use of frozen creams, and ices in general, except as eaten at the confectioner's or ordered for special occasions, has been restricted by the scarcity of ice and the disposition to regard it as a luxury, rather than, as in the United States, as a necessity.

### 3. THE HISTORY OF THE TERM.

3. 1. The term *ice-cream* is a compound. It is necessary to determine

(a) The meaning and use of the element *ice* (3. 12).

(b) The meaning and use of the element *cream* (3. 13).

(c) The manner of, and reason for, the formation of the compound (3. 14).

(d) The relation of the terms *ice*, *ice cream*, in their subsequent English use as general terms, together with the adoption of subsequent secondary terms to define special classes or kinds included under these general terms (3. 15).

(e) The present meaning of *ice cream* in American use as determined by all available evidence (3. 2).

In all cases except the last, the foreign terms must be considered from which the English terms were derived.

### 3. 12. ICE.

3. 121. *Ice*.—The generic term for frozen confections in Italian has been from the earliest records, *gelato*, literally "iced (thing)." It is used of the confection considered in the mass, as in the question "*Che gelato avete?*" "What ice (*i. e.*, ices) have you?", or in speaking of varieties, *gelato di arancio*, orange ice, *gelato di crema*, vanilla ice, etc., with the plural, *gelati*, ices (of several sorts). Also, because of the mode of its formation, it could, without awkwardness, be used with the article or a numeral in the sense of a portion of ice, as *un gelato doppio*, a large sized ice, *cinque gelati*, five portions of ice.

3. 122. In German, a term similar in formation and use, *Gefrorenes*, appears. It was presumably modeled directly upon the Italian, while the alternative term *Eis* either developed naturally, or was adopted, by translation, from the French *glace*.

3. 123. In French, the use of a term modeled on the Italian was impossible, for French had long ceased to turn participles used absolutely into nouns. A noun *glacé* would have been as impossible as the turning of *iced* in English into a noun. The new confection was called simply *glace*, "ice," this new application involving what was but a natural extension of its old sense. An interesting consequence followed in that, while *glace* in its new use made necessary a plural *glaces* in the sense of "different kinds of ice," this plural was not approved as correct by the Academy until 1762, and the use of the singular with the article *une* (*une glace*, a kind of ice, or a portion of ice) was still regarded as incorrect or better avoided till well into the 19th century.

3. 124. In England, the term *ice* was undoubtedly adopted, by translation, from the French—the more easily as it would have been the term that would naturally have been used had the confection originated in England. The point is immaterial, but adoption, rather than independent selection of it, is assured by the fact that the confection undoubtedly came to England from France, and by the obvious dependence of 18th century English cook-books upon French. It has remained in use in England as a generic term. Its use in the plural appears early—but, curiously enough, its use with the numeral-article *an* cannot be found before the 19th century. Sir

James Murray asked for quotations for "an ice" in *Notes and Queries*, VIIIth series, IX, 3, 26, mentioning a friend who said he could distinctly remember when "an ice" was considered a vulgarism. Two correspondents supplied quotations for "ices", but this was not, of course, what Sir James Murray wanted. It had been customary to say "Will you take some of the ice (or "some ice")?" not "an ice", even though the ices were in individual portions or separate moulds.

### 3. 13. CREAM.

3. 131. *Cream*, in the compound term *ice cream*, was not used in its original, or primary sense.

\*The sense used was a transferred sense, peculiar to cookery. It had long been established in familiar use. The English record shows examples of it two centuries or more before the making of ices was practised.

\*The corresponding term *crème*, and, no doubt, the Italian *crema*, were similarly used in this transferred sense long before they were taken up into the terms applied to ices.

3. 132. The primary meaning of *cream* is the oily part of cow's milk, or that of other animals, which rises to the surface of standing milk, or is separated from the milk by skimming, or the modern "separator".

It is valued not only as the source of butter, but also as being more palatable than milk for eating with other foods or as an ingredient in cookery. The value set upon it is perhaps illustrated in the probable ultimate derivation of the word from Latin *chrisma*, consecrated oil used in anointing.

Various derived senses of the word originate naturally in the appearance and properties of cream—its application to the head of a fermenting liquid, the mantling foam of wine, the best part or refined residue of a thing (as in *cream of tartar*, the "cream" of a joke) and the like. None of these equals the derived sense employed in cookery in wide extent and importance of use, in virtue of which the word in this sense came to be treated with about the same freedom as if a separate word.

3. 133. The primary sense of *cream* will, hereafter, for clearness, be called "cream of milk", and the derived sense simply *cream*.

3. 134. The frequent use of cream of milk as a main ingredient in mixtures used in cookery led to the application of the word *cream* to such mixtures, or to any mixtures of like appearance or kind or use, or to substances resembling cream of milk, or similarly used.

The range of meanings under this sense of *cream* as a mixture includes:

(a) A mixture of cream of milk and other ingredients to give it body or flavor, such as eggs, starches, fruit or vegetable pulp or juices, essences, sugar, etc.

(b) A mixture of cream of milk, and milk, with other ingredients as in (a).

(c) A mixture of milk and other ingredients as in (a)—but without cream of milk except as contained in the milk.

(d) A mixture of like kind and use, made of similar ingredients,—characteristically eggs—except as not containing either cream of milk or milk.

(e) A substance made of nuts or grain resembling cream of milk in appearance, and used separately or in mixtures like the above.

This sense of *cream* still exists although somewhat supplanted by the word *custard* in its latest transfer of meaning.

To this brief will be found appended definitions of this sense of *cream* from modern standard dictionaries, with a selected series of citations in further proof and illustration.

3. 135. It must be noted that the date of the first appearance of the transitions of sense will not correspond in order of time to the several classes of mixtures given in logical order above—for direct transfer of the term at any time to any one of the classes was too easy and natural; furthermore, any of these might be in use a long time without chancing to be recorded in a work that has remained to us.

The earliest record we have of *cream* in these derived senses is of senses (c), (d), (e), in a work dating about 1430 (see list of citations). Citations for mixtures under groups (a) and (b) appear in the 17th century, but undoubtedly such mixtures go back centuries earlier.

How well established the general cookery use of *cream* was by the beginning of the 17th century may be illustrated by Bacon's use of it in connection with the newly-introduced grain, maize, of which he says, in his *Sylva Sylvarum* (1627), 49:

"*Indian Maize* hath (of certain) an excellent Spirit of Nourishment, but it must be thoroughly boiled, and made into a Maiz-cream like a Barley-Cream. I judge the same of Rice, made into a Cream."

In 54, he recommends using "Cream [of milk], or Almond or Pistacho-milk, or Barley, or Maiz Cream" as a partial substitute for butter or fat in "chuets", which were one of the earlier forms of mince pie.

3. 136. Derived senses of words are innumerable in every language, and their development is one of the most common ways in which the vocabulary is enlarged. To reprehend them, or to refuse to recognize them, if established in general acceptance, is wholly unjustifiable.

A few examples of similar derived senses may be cited in illustration, the list (which might be indefinitely extended were our vocabulary in general drawn upon) being confined to words denoting foods, or connected with cookery:

*Meat*: The original sense was food in general. This sense is still used archaically and in certain locations. But the derived sense is the one that is recognized.

*Flour*: Originally the same word as *flower*. Applied to any finely ground grain, then specifically flour of wheat, then to any substance

resembling flour because ground fine, *e. g.*, "manioc flour", "potato flour", "flour of mustard", "meat flour", "blood flour", "saltpetre flour", "sulphur flour".

*Meal*: Coarsely ground grain, hence "linseed meal", "beef meal", "blood meal", "bone meal", "calf meal", "bee meal", "gunpowder meal", etc.

*Salt*: Originally "common salt", extended to all kinds of salts.

*Milk*: Cow's milk, or the milk of other domestic animals; hence, a substance or mixture used in cookery, such as "milk of almonds", or "pistachio milk"; or used in medicine or the arts, such as "milk of lime", "milk of sulphur", "milk of roses", "milk of wax", or a milk-like substance in plants such as the "milk" of the cocoanut, or of various "milk-bushes", "milk-trees", or other plants.

*Butter*: Originally and still, a familiar comestible and ingredient used in cookery, made from milk-fat—but also applied to mixtures of butter and other substances, and to substances or mixtures used like butter or resembling it, such as "almond butter", "apple butter", "mace butter", "shea butter", "bean butter", "fruit butter", "peanut butter".

*Bean*: One of the various garden beans, hence, other seeds of like appearance, such as the "buck bean", "coffee bean", "locust bean", "Tonka bean".

*Currants*: Originally, a small variety of grape; transferred to the garden fruit.

*Soda*: Originally, and still, the carbonate of soda, but extended to the bicarbonate, "baking soda", and various compounds of sodium, as "caustic soda."

*Ale*: Originally, and still, a fermented alcoholic liquor; also, a beverage made by a mixture of this liquor and other ingredients, as "buttered ale"; also extended to various non-alcoholic beverages, as "ginger ale."

*Beer*: Originally equivalent to *ale*, then distinguished from it, when "hops and heresy" came to England (16th century) by being hopped; now the inclusive class-term for all kinds of malt liquor, though also applied, as a secondary class-term, to distinguish the heavier or darker malt-liquors. Also, a beverage made by mixture, as "buttered beer". Also extended to various non-alcoholic liquors, as "birch beer", "spruce beer", "nettle beer", "treacle beer".

*Brandy*: Originally, and still specifically, spirits made from wine or grapes, but extended to spirits made from various other fruits, etc., as "blackberry brandy", "cherry brandy", "peach brandy", "corn brandy".

As *cream* in its transferred use comes to mean not only an article of food, but also a characteristic form of preparing it, a further list of examples may be given in which other words denoting forms of serving food have had their meaning transferred and extended.

*Bread*: Originally and still, specifically, a prepared article of food, made of meal or flour, wetted, kneaded, generally "raised", and baked; hence, widely transferred to various preparations of meal or flour prepared more or less differently. Also applied to other basic

substances prepared or eaten like bread, such as "bean bread," "potato bread", the "native bread" of Australia; in Anglo-Saxon use, in the compound "bee-bread", honey-comb; in later use, the pollen, or pollen and honey, eaten by nurse bees.

*Loaf*: Originally, and still in local use, bread. In general use, a special shape of bread. In transferred usage, in cookery, a dish made by using a loaf as a casing, as "oyster loaf", "mushroom loaf", also, food prepared in the shape of a loaf, as "veal loaf".

*Paste*: Originally, flour and water, or milk, kneaded to a soft dough as used for various purposes in cookery—later, this compound with shortening as used in making pastry. Transferred to such mixtures as variously blended with other ingredients into sweets. Hence transferred to mixtures of similar consistency made of fish, etc., used as relishes, such as "anchovy paste", "bloater paste", "shrimp paste". The use of the word to denote mixtures of like consistency outside of cookery (as *paste* for sticking things together) is derived from the use in cookery.

*Pie*: Originally, a dish of meat or fish cooked in pastry; transferred about the 16th century to sweet dishes of fruit, creams, etc., similarly baked in pastry. Compare *tart*, *pudding*, *jelly*, *blanc-mange*, *custard*.

*Tart*: Of similar history, except that tarts filled with fruit appear early beside tarts filled with meat, fish, cheese, etc. The word later became entangled with *pie*, the two being differently differentiated locally.

*Pudding*: Originally and still, a dish made by stuffing the stomach or entrails of an animal with various mixtures of meat, meal, seasoning, etc., and boiling the whole. Later, a dish made by boiling in a bag animal or vegetable mixtures enclosed in paste (see *paste* above). Later, such preparations, cooked in a dish by baking. Now, specifically, beside the older uses, a sweet of one of a wide variety of mixtures, cooked, or uncooked.

*Plum pudding*: Originally, a pudding with prunes as a main ingredient; later (from the 17th century) with raisins in the place of plums; hence, the common use of the word *plums* to denote raisins.

*Cake*: Originally, bread formed in a special shape and turned while baking; in local use, oat bread so treated; also widely extended to preparations of flour or meal, cooked in a flattish round shape, as "buckwheat cakes," or foods not made of flour or meal, so prepared, as "potato cakes", "fish cakes". Also widely extended as the name of a shape in application to other things than foods, as cakes of soap, tobacco, mud, manure, dynamite, etc.

Also, by transfer, fancy bread, prepared with the addition of various ingredients to give flavor and "richness." Widely extended to preparations similarly used not necessarily containing flour and not confined to a particular shape or mode of baking, such as the word *cake* originally predicated (consider the common phrase, a "loaf of cake").

*Cheese-cake*: A cake or tart with a filling of cheese, eggs, etc.



Still so made in the 19th century, but already by transfer, in the 18th century, a cake or tart with a filling of various creams, used as a sweet.

*Jelly*: Originally, a food made from the gelatin of meat; later, a sweet made by boiling and cooling fruit or vegetable juices with sugar.

*Blanc-mange*: Originally a rich meat-pie made with cream of milk, eggs, sugar, nuts, etc.; later, a sweet made with gelatin or isinglass; later, a sweet made simply with flour or milk, etc.

3. 137. *Custard*: This term, which belongs in the above list, demands special attention because of its encroachment in its later history upon the word *cream*. Originally it meant (1) a dish of eggs, cheese, and sometimes meat, baked with a crust; (2) a pudding made of eggs and milk and flavoring, etc., baked. Later (3) the word came to be applied to a mixture of this kind which is brought to a boil, but not baked, so that it remains fluid. This remains its ruling sense, though it is loosely applied to such mixtures used without scalding or boiling. Sense (1) remained certainly to the middle of the 19th century and may still be in use locally. Sense (2) is in common use, being specially indicated by the phrasal compound "baked custard". Sense (3) developed in the 18th and 19th centuries and came into conflict with, and partly superseded, the word *cream*, as denoting a mixture of the same kind, and, as often, similarly scalded, or as made with cream of milk or milk scalded before other ingredients were added. Hence its modern use in the phrase "frozen custard", referred to below.

3. 138. It remains to prove that the term *cream* in the compound *ice cream* was used in its transferred sense of a mixture, and not its primary sense of cream of milk.

(a) Ices of the cream kind have never been made of cream of milk alone. A mixture is and has always been used. If the basic ingredient is cream of milk only, which is exceptionally the case in the whole history of the product, there must be the addition of sugar, fruit pulp or juices or essences, as flavoring. These additions at once predicate the transferred sense of the word, and not the primary.

(b) To the French and English (and doubtless the Italian) cook of the 17th or 18th centuries, creams as mixtures were a familiar fact, and the word as a class-term for a wide variety of mixtures had become separated from its original sense. The new process merely involved taking such familiar mixtures and freezing them.

We may find difficulty in apprehending this, as the word *cream* in its transferred sense remains in somewhat limited use in special connections such as "cream sauce", "Spanish cream", "cream cake", "creamed fish" and the like, the word *custard* now largely taking the place of the former general use of *cream*. But at the time ices came in, this was not the case. At that time *ice cream*, ice of the *cream* variety, was simply one of the many well-known creams frozen and made into the new confection, "ice". It was no more conceived of as "cream of milk frozen, or made into ice", than



"layer cake" is to our minds a special form of bread dough treated in a particular way, instead of simply cake made in layers with a filler between.

(c) In the third place, before the freezing of creams came in, the various creams were characteristically served cold, as are their modern representatives today, the soft custards. Directions that they shall be chilled appear in English, French, and (as soon as they are available) in Italian recipes. A noteworthy quotation may be cited here. In the *London Gazette* of 1688, No. 2383/2, appear the words, "All such Fruits, Iced Creams, and such other Varieties as the Season afforded." This does not refer to *frozen* creams (if it did, the point under consideration would be established at once), as other references to frozen creams would appear before the much later date when they are common (after 1750). But it does show the practice of chilling creams, and makes clear how natural the transition from iced creams to frozen creams was. Note the use of the plural, as illustrating the frequent and familiar use of various mixtures.

(d) When recipes for frozen creams appear, the creams used are not merely of the same general character as the creams used before the practice of freezing came in, but are often practically the same.

(e) Further, after the practice of freezing came in, the recipes for creams generally contain the suggestion that, if preferred, they may be frozen. An interesting illustration is the Italian use of frozen *blanc-mange*.

3. 139. It follows from this evidence that *cream* in the term *ice cream* is *cream*, a mixture, and not *cream* in its original sense of cream of milk.

The manner and reason of its use in the compound falls under the discussion of the compound as a whole which follows.

### 3. 14. THE COMPOUND.

3. 141. The classification of compounds—whether according to form (as combinations of noun with noun, noun and verb, adjective and noun, etc.) or according to the sense-relation between the elements (as of union, e. g. *copper-zinc*; place where, e. g. *country-house*; time when, e. g. *day-dream*; place whence or whither, e. g. *jail-delivery*, *garret-stairs*, etc., etc.)—has been treated by many scholars, for example Bruggmann, Tobler, Wilmanns, Maetzner, Wundt, Koch, Sweet, Sayce, Kellner, Jespersen, and, most recently and fully, in relation to English, by Bergstens in his *Compound Substantives in English*, Upsala, 1911.

In a true, or close, compound noun, made up of two nouns, the two nouns are simply put together to express some idea into which they both enter. According to the closeness of the relation between them, so that they are felt as forming one word, or the frequency of their use in this way together, the two elements of the compound are written together or apart. Often words written separately are as truly compounds as if written with a hyphen or solid. There is an

indefinite gradation from such close compounds as *honeycomb* or *stargazer* to such phrasal compounds as "apple pie" or "city point-of-view." Attempts to define the nature of the relation between the elements in terms of grammar are largely fruitless so far as formulating any general rules are concerned.

For example, in the loose compounds *stone wall*, *cannon ball*, are *stone* or *cannon* adjectives or nouns? At a meeting of the Philological Society in 1881, Sweet and Sir James Murray said they were nouns used as mere adjuncts, Morris and Furnivall, both eminent philologists, affirmed them to be adjectives. Jespersen (*Mod. Hist. Gram.* 1914, II. 13. 11 ff.) argues that such elements of compounds are felt as adjectives. Bergsten argues that they are not truly adjectives, even though they can show one or another quality of adjectives on occasion, such as taking an adverbial modifier ("a wholly city point-of-view").

Bergsten is correct, but does not go far enough. The truth of the matter is that nouns as used are neither nouns or adjectives—they are nouns by origin, but, as so used, they become something neither noun nor adjective, namely elements in a compound. Has *pen* in *pen drawing* become an adjective, or is it felt as an adjective? It is, and remains, a noun in origin used in short-hand fashion for "made with a pen." The fact that in certain cases nouns so used may be used in the same way as adjectives placed before nouns are used does not prove anything with regard to innumerable compounds, in which the first elements in no wise are felt to be, or behave like, adjectives.

The simple fact is that English readily coins compounds by taking a word, noun or other, and placing it before another word. The word so placed stands for a whole phrase. The user has a clear apprehension of a relation between the two which he intends to express, and believes that this relation will be expressed to his hearer or reader. In some cases, the relation is so complicated, and the ellipsis of words understood is so difficult, that definition may be necessary, as, for example, such cases as *horse-power* or *foot-pound*. But in multitudinous cases, the combination is made, and the word is uttered and understood by the hearer, without any conscious reasoning whatsoever.

As English freely coins compounds with every degree of looseness and the widest freedom as regards the nature of the relation, it is not possible to say except in the broadest possible way that such and such types of compounds are English, and such others are not English. Great numbers of compounds may be ranged together as alike in form, and may seem to establish a "rule" or "type", but further examination readily discloses numerous partial or complete exceptions, which show that no "rule" really exists, and that the only factor in the matter is the instinct of the user with reference to the relation he means to express.

This applies even to the most well-marked natural tendencies of the language. For example, the natural order for compounds in English is, undeniably, for the class-term to come second, and the

defining or particularizing term to come first—thus in *coal oil*, oil is the class-term, and the word coal means “of like origin with coal,” “that comes from deposits of coal.” But if, because of the meaning and relation of the terms involved, either can come first without confusion, or if a native model or a foreign model for the compound exerts its influence, English will readily abandon what might seem to be its well-marked “rule.” The freedom of English in this respect, its unembarrassed directness and decisiveness in sensitively obeying natural instincts, in place of subjecting itself to rigid conventions, has often been commented upon with admiration by foreign scholars from Grimm to Jespersen.

The facts stated above are pertinent in the present inquiry, because the compound word *ice-cream* is an apparent exception to a well-marked tendency in English compounds in one regard, and is a real exception, though one of a large class, to a well-marked tendency in phrasal compounds in another regard, that of its form.

3. 142. The class-term for frozen confections in their wide variety was, in the various languages concerned, “ice”—Italian *gelato*, French *glace*, English *ice*.

This term might often not be used, however, in the name given to special kinds of ice for two reasons:

(a) Many varieties already had special names, namely, the beverages and creams already in use. The old names were naturally continued as special names.

(b) New materials, methods, recipes necessitated the invention of special distinguishing names. A large number of secondary class-names and individual names result.

Old class-names (like *cream*) for a time or in limited use tend to supplant *ice* or to find a place beside it, reducing it to a limited meaning as the name of a special class, but in most countries, *ice* has retained its sovereignty as the inclusive class-name for frozen confections of whatever kind.

Italian has always used *gelato* as the inclusive term; French has always used *glace*; in England *ice* finally overcame *ice cream*; in Germany, *Gefrorenes* covers both water ices and frozen creams; in America, in spite of continued foreign influence,—the influence of English *ice*, and of French, Italian and German cook-books, cooks, and confectioners, and the natural tendency in such matters to assume foreign superiority, or borrow foreign terms as indicating novelty and fashionable approval—*ice cream*, because of the general preference for ices of the cream variety, has become in popular use the general inclusive class-name.

A review in detail of the terms used in Italian and French is here necessary to show the general development and explain the development of the terms used in English.

## 3. 1421. ITALIAN TERMS.

*Gelato*: The general class-name (cf. 3. 12).

*Granita* and *gramolata*: A subordinate class-name for a class of ices that developed by freezing beverages made of fruit-juices, especially lemonade, to a semi-soft and granular (whence the name) condition; served in glasses at social functions and in the morning at *caffes*.

*Sorbetto*: Originally, a frozen beverage like the *granita*, but distinguished from it by its wider range of ingredients other than fruit-juices, its smoother consistency, and as having more sugar. In this way the inclusion of the term blends vaguely with *granita* on the one hand and with the general family of *gelati* on the other, including *crema*, or creams. The characteristic feature of *sorbetti* is that they are semi-frozen.

*Gelato di crema*: Literally "Ice made of a cream". The term applies properly to all frozen creams, as *gelato di crema alla vainiglia*, *gelato di crema al pistacchio*, "ice of vanilla cream", "ice of pistache cream". The phrase by itself means "vanilla ice cream", for the reason that *crema*, by itself, came to mean, among the various creams, a cream flavored with vanilla, just as our *custard* (as used for earlier *cream*) might have come to stand for "vanilla cream", because of the almost invariable use of vanilla as a flavoring. Other creams, unfrozen or frozen, are usually called *crema* with a specific term added (see *crema* below) or *gelati* with a specific term.

*Crema*: A subordinate class-name, including generically the various "creams" used both frozen and unfrozen. The full term would be *gelato di crema*, with additional specificizing term, as noted above, but *crema* suffices by itself, unless it is desired to make clear that the frozen form is intended. Examples are *crema vergine* (a special mixture variously flavored), *crema al caffè*, *crema al cioccolato*, etc. Practically all the creams may be eaten either way, unfrozen or frozen to a preferred degree of hardness. The tendency to cite the practice of foreign nations appears even in Italy, where the making of ices started, as *crema francese alle mandorle*, *crema francese d'albicocche*, "French almond cream", "French apricot cream", *bavarese alla milanese*, "Bavarian cream in the Milanese fashion", etc.

*Ghiacciato*: The participial adjective *iced*, added to confections having a special name of their own, as *zabaglione ghiacciato* (wine, eggs, sugar, spices, etc., forming a punch which is beaten and iced or frozen).

*Spongata*: An ice made of beaten cream of like character with the Spanish *espuma* (froth), French, hence English, *mousse* (literally, froth, foam).

*Plombiere*: An elaborate ice made with whipped cream, nuts, candied fruit, or the like; perhaps derived from French use.

## 3. 1422. FRENCH TERMS.

*Glace*: Literally *ice* (cf. 3. 12). This, in French, is the gen inclusive term for all "ices". Use of the participial adjective *glacée* appears also, to permit a secondary specific term to come first, as in *crème glacée*. But *glace* is the primary class term. The official authority, the *Dictionary of the French Academy*, includes under *glace* fluids frozen and taken for refreshment, such as *glace à la crème*, *à la vanille*, *au citron*, *au chocolat*, etc. (i. e. ice of the cream kind, ice with vanilla, lemon, chocolate flavoring, etc.). So also cook-books. To cite examples, *Le Cannameliste Français*, 1768, includes under ice "frozen fruits, whipped eggs, mousse, cheeses (*fromages*), all kinds of frozen things of which we imitate the form"; the *Nouvel Manuel de Limonadier, Glacier, Chocolateur, et Confiseur*, 1851, says that glaces are confections made of different substances, vegetable juices, fruit juices, creams (*des crèmes*)".

*Glacée*: Literally "frozen", used when prominence is to be given to a material or mixture used, or to the form used. For example, *fruits glacés*, *crèmes glacées* (in place of *glaces aux fruits*, *glace à la crème*), *fromages glacés* ("iced cheeses", that is, ices shaped like cheeses).

*Crème*: A cream-mixture—of any of the sorts in use before ices or invented later—as used unfrozen or frozen. When frozen, the confection may be termed *glace à la crème*, or, to specify this particular kind of ice, with the distinguishing term put first for prominence, *crème à la glace*, cream-mixture served as an ice, or *crème glacée*, cream-mixture frozen. If the freezing may be taken for granted, simply *crème*, with a further specific term, may be used, as *crème d'abricots*, *crème de citron*, that is, the same names as are used for such creams when unfrozen.

*Neige*: Literally, "snow": apparently a soft ice, especially, though not exclusively, a water ice, so named merely fancifully, as no special ingredients or manner of freezing seem to be indicated.

*Fromage*: Literally "cheese": An ice moulded like a small cheese, as *fromage de café*, *fromage de fraises*, "coffee cheese", "strawberry cheese".

*Tortue*: Literally, "tart", indicating method of serving.

*Canneton*: Literally, a mould, applied to the mould or form, and hence to the mass of ice moulded, as we use "mould of ice cream". In French, used commonly with a specific phrase, *de chocolat*, *de fraises*, *de framboises*, as an accepted title, while in English "mould of chocolate", "mould of strawberry", "mould of raspberry" can only be used colloquially.

*Sorbet*: From Ital. *sorbetto*, sherbet, and similarly used for a soft ice, half a beverage, especially water ices, but also cream ices similarly used.

*Mousse*: An ice of whipped cream of milk, characteristically frozen without stirring.



*rappé*: Partly frozen water ice, served soft and with a granular consistency like the Italian *granita*.

*Plombière*: A specific name of indefinite inclusion added to *glace* to denote more or less elaborate ices made with the addition of whipped cream, nuts, candied fruit, etc.

Two points in relation to the terms used in French demand special note.

(1) The use of *crème* is precisely similar to its use in English. It means a mixture, not specifically cream of milk, for it is used in the plural (*les crèmes*), with *une* ("a cream"), and with the demonstrative *cette* ("this cream"), and recipes for these mixtures state that they may be used either frozen or unfrozen. Cream of milk or milk need not enter into such mixtures; but in the case of a fruit mixture, eggs at least do, or it is not a *crème*, but a *glace à l'eau* (see below).

(2) The citations given below explain the origin of our term "water ice". Just as creams existed before frozen creams, so also beverages made of fruit juices—*eaux délicieuses*, literally "delicious waters". The term *eau* in French means not only water, but also juice of fruits or vegetables, and had also a wide application in professional medical use, and in the medicinal and culinary art of the expert housekeeper. The old use appears in French *eau de vie*, *eau de Cologne*, and in English "strong waters", "rose water". In English *soda water*, the use of *water* is derived from "mineral water", and its analogues; but the term as a whole has developed a wide range of inclusion, paralleling in a way the extension of "cream" and "water".

The word *water*, in the same sense of beverage, might denote fruit juice, of one fruit or of several mixed, with or without water. In Ribon's *L'Ecole Parfaite des Officiers de Bouche*, 1737, is an article telling how to freeze these *eaux délicieuses* into what we would call "water ices". The *Cuisinière Bourgeoise* of Toppens, 1759, says "in summer you take *eaux d'été*, beverages appropriate to summer . . . place them in moulds, and, as they freeze, you take care to stir them from time to time". Cardelli in 1851 writes: "We distinguish between two kinds of mixtures for ices. These are fruit ices of the water kind (*glaces aux fruits à l'eau*) and ices made from creams (*glaces à la crème*). Fruit ices are made of sugar, water, and different fruit flavors . . . Ices of the cream kind are made of cream of milk, or of milk, of eggs, of sugar, and of different flavors."

### 3. 1423. ENGLISH TERMS.

The English terms are directly modeled on the French. The French terms which might serve as models were:

*Glace.*

*Glace à la crème.*

*Crème glacée.*

*Crème à la glace.*

The last had no general currency. It represents, as over against *glace à la crème*, the natural tendency to waver between giving precedence to the old confection, *crème*, now used also frozen, or the new confection, *glace*, when made of the old confection *crème*.

*Ice*: Used to represent French *glace*, and retained as a general term to the present day in England (see 3. 12), and, to a limited extent, in America.

*Cream*: The old use of *cream* for the various creams remains, and recipes commonly state that they may be used frozen or unfrozen. But the absolute use of *cream* for frozen cream, as in French *crème d'abricot*, etc., short for *glace à la crème d'abricot*, etc., is not common in English. Ices made from creams are called *ice cream*—"vanilla ice cream", etc.

*Ice cream*: (as a specific term): The English equivalent of French *glace à la crème* and *crème glacée* is ice cream.

In taking up the discussion of this term, it must be noted that French, in forming phrasal compounds, puts the general class-term first, the distinguishing or specializing term second. English does the reverse of this—except in a few cases like *court baron*, *gum tragacanth*. The normal order puts the class-term second, the term denoting kind first; for example, *mud-guard*, a guard that keeps off mud, *ice-pick*, a pick to pick ice, *pea-soup*, a soup made of pease.

In *ice cream*, we have apparently a reversal of this order. A class-term of what seems wider inclusion comes first; a class term of somewhat narrower inclusion second.

The exception is, in reality, only apparent, and the reasons for the order may be readily shown:

(a) The case is one of those where, both terms being class-terms, there is the possibility of either being taken as the main class-term and the other as the specificizing term. The two terms, when the compound was formed, were evenly balanced, for *ice* in its new sense of a confection was not felt to be a term of wide inclusion. The compound might have been either *ice cream* or *cream ice*, so far as an adequate expression of the idea was concerned.

Which of two possible alternatives will be used will depend on the shade of emphasis in the user's mind. Examples may be given of similar cases in which both possible forms had currency for a time before one drove the other out. Bergsten (*Compound Substantives in English*, p. 57) gives a number of examples, to which others may be added:

bell-glass  
bug-bear  
comb-card  
cylinder-axis  
hook-bill  
jaw-foot  
lady-cow  
pike-hammer  
twin-brother

glass-bell  
bear-bug  
carding-comb  
axis-cylinder  
bill-hook  
foot-jaw  
cow-lady  
hammer-pike  
brother-twin



spring-head	head-spring
screw-jack	jack-screw
man-servant	servant-man
maid-servant	servant-maid
boy-scout	scout-boy
bachelor-girl	girl-bachelor
Queen-mother	mother-Queen
Empress-Dowager	Dowager-Empress
apple-john	john-apple
brandy-cherry	cherry-brandy
laurel-cherry	cherry-laurel
leaf-gold	gold-leaf
lion-ant	ant-lion
oak-holm	holm-oak
petre-salt	salt-petre
sugar-candy	candy-sugar
ledger-ambassador	ambassador-ledger
bed-rock	rock-bed
fossil-cork	cork-fossil
mole-rat	rat-mole
nettle-hemp	hemp-nettle
plate-silver	silver-plate
cake-yeast	yeast-cake
gall-nut	nut-gall
rock-soap	soap-rock
rock-salt	salt-rock
powder meal	meal powder

How naturally these alternatives may arise appears clearly in such cases as *bill-hook*, *hook-bill*, where both elements mean a tool, and it is indifferent whether you say a bill of the hook-kind, or a hook used like a bill—or in such cases as *gall-nut* over against *nut-gall*, or *salt-rock* over against *rock-salt*, where either element may have precedence over the other for the moment. Others are not so clear, till examined into. A cordial made of cherry juice or pulp gets to be called *cherry*, and as made with brandy, *brandy cherry*, while on the other hand, brandy flavored by soaking cherries in it is called *cherry brandy*, and the two are used interchangeably for a while; *brandy cherry* may very possibly still be in use dialectally.

Of the two possible compounds in English, *cream ice* might have existed, indeed perhaps did. It is in use at present both in England and this country, but only in cook-book and trade use as a convenient parallel term to *water ice*. There is no evidence of its early use found in the record, and it may, with certainty, be regarded as a recent coinage.

(b) That *ice cream* should have developed rather than *cream ice* is readily explainable. Had the mixtures used, as well as the process, been new, *cream ice* might have been the dominant form. But in England, as in France, the word *cream* was familiar for the large

family of *creams*, which were by the new process made into the confection *ice*, in place of being merely chilled. A natural model for the new term existed in the names of these creams—"almond cream", "pistache cream", "lemon cream", hence naturally, *ice cream*. No difficulty was felt in the absence of a term denoting kind or flavor, for *cream* was used absolutely as we use *custard* in such phrases as "To make custard", "Will you take custard?", "To have custard for dinner."

Precisely the same influence in France led to the terms *crème glacée* and the rare *crème à la glace* beside *glace à la crème*. The influence of French *crème glacée* must also be reckoned with as influencing the English *ice cream*.

The reason for the order of the elements being clear, it is next necessary to explain the form of the first element—why *ice cream* and not *iced cream*.

Loose or phrasal compounds of the type participle plus noun are so numerous in English—*cut glass*, *burnt sugar*, *spun-yarn*, *cast-iron*, *fretted-work*, *moulded ware*, etc.—as to establish a fixed and powerful formative type. Unquestionably, if one were consciously to invent a term in a case like the one under consideration, one would naturally use this type—or even spontaneously and unconsciously, if one's mind were fixed upon a process employed and one wanted to stress that process—so, for example, a chemist might say to a class, "This is not smelted iron, it is sublimated iron" or "This is not cast or wrought iron, it is crystallized iron".

But numerous as such syntactic compounds are in English, they do not form the only, the necessary, or the inevitable type, in expressing such an idea, when the coinage is involuntary and unconscious—even in cases where one might think the desire to lay stress on the process might be instinctive and uppermost in the speaker's mind. For it may be quite as natural to think of the agency used, or state, or shape reached in the course of, or as a result of, the process concerned—in which case the result will be not participle plus noun, but noun plus noun, as in "open-hearth steel", "pig iron". In the special case, any one of a number of factors may subordinate the idea of the process, so that the use of the participle, seemingly so natural, does not take place. In order that it may be clearly realized that such compounds are perfectly natural, and have been in the past and are at present used frequently in English, a list of illustrations may be given—especially as, in individual cases, such compounds are sometimes regarded ignorantly as incorrect, and are "corrected" by would be purists:

*Ice water*: not "short" for "iced water", but "water of ice", "water from ice", "water with ice in it", "water cooled by ice". Often regarded as "incorrect", the use of *iced water* being urged as the logical and correct term.

*Brandy cherries*: "cherries in brandy"; used beside *brandied cherries*, which is now the recognized term.

*Jelly blood*: "blood that has become a jelly"; equivalent to *jellied broth*.

*Lump sugar*: "sugar made into lump form".

*Loaf sugar*.

*Layer cake*: this would be equivalent to *layered cake*, if an active verb "to layer" in the proper sense existed. Note the free simplicity of the formation, *layer* being used to indicate briefly a complicated process.

*Butter ale*: used beside *buttered ale*.

*Buttermilk*: "milk" left when the butter has been separated from the cream by churning, or, now, whole milk converted to a beverage resembling the original buttermilk by addition of a ferment.

*Butter toast*: used beside *buttered toast*.

*Jam tart*: i. e., filled with jam.

*Roll bread*: i. e., in the form of a roll.

*Roll brimstone*.

*Roll candle*.

*Roll tobacco*.

*Bottle ale*: used beside *bottled ale*, the stress being here on the ales being in bottles, instead of bottled from the cask.

*Meal malt*: "malt reduced to meal".

*Meal powder*.

*Plug tobacco*.

*Powder beef*: beside *powdered beef*.

*Powder sugar*: beside *powdered sugar*, the sense here being "sugar in powder form".

*Loaf bread*.

*Brick oil*: oil with brick in it, formerly used as a drug.

*Button mushroom*.

*Bead amber*.

*Mince meat*: used beside "minced meat", but not "short" for it, the sense being "meat reduced to a mince".

*Soap ashes*: ashes for making lye for making soap.

*Bean ore*: ore in a form like beans.

*Pea coal*.

*Egg coal*.

The list might be almost indefinitely extended.

A special note is necessary on the cases in which a participle plus noun phrase appears beside a noun plus noun phrasal compound. Where such pairs appear, the error is sometimes made of supposing that the latter is necessarily derived from the former. It might be so in an individual case, but is by no means necessarily so in every case. The point is touched upon because the *New English Dictionary*, after defining *ice cream* adds "(Earlier term, *iced cream*)". If this is intended to mean that *ice cream* was derived from *iced cream*, by a dropping of the *d*, it is an error. If it means that there were two alternative forms, and that *iced cream* was the earlier, it is, so far as appears from the record, also an error, for they appear simultaneously. If it means that there has also been use of the form *iced cream*, the statement is correct in substance but not in form, as *iced*

*cream* does occur, but very rarely indeed, and plainly as a translation of French *crème glacée*. The note should read "Also, in former use, *iced cream*."

The list of examples makes it clear why the term adopted took the form *ice cream* and not *iced cream*. Two conceptions had to be combined to form a distinctive class-name. One was the old and familiar conception of the various *creams*. The other was the new confection termed *ice*. The assumption uppermost in the mind of the users was not "a cream that has been iced" but "a cream made into ice". From this standpoint, *cream* is naturally the class-name, and *ice* the defining term. There are ordinary creams on the one hand, and ice creams on the other. The feeling is much the same as in *liqueur brandy*, a brandy designed to serve as a liqueur, or as if, on the introduction of *soufflés*, a housekeeper, with the general class of custards or puddings in mind should think of "soufflé custards", or "soufflé puddings", as a new class.

*Ice cream* (as a generic term): Not only was *ice cream* preferred over a possible *cream ice*, but it also came to be used as a primary class-term, beside, and used in the same way as, *ice*. This is wholly natural, for the reason that *cream* might denote a mixture with no *cream of milk* in it or even *milk*. In French use, a *crème*, to be so called, had, apparently, to have in it at least eggs with fruit-juice or other ingredients. But in English no such distinction seems to have stood in the way. In the 18th century, the term *ice cream* was used of any kind of ice. Thus, in 1786, in the noted cookery-book by Mary Smith, *The Complete Housekeeper and Professed Cook*, *ice cream* is the general term under which are grouped raspberry ice made with cream of milk, and orange, peach and apricot, all of them what we would call "water ices". So also in 1791 Miss Frazer includes under *ice creams*, apricot, pineapple, and peach water ice.

In England, *ice cream* continued to be used as a primary class-name, beside *ice* and *ices*, but never succeeded in usurping priority over *ice*, owing to the fact that both terms were used as secondary class-names (*ice* tending to mean *water ice*), and also to the fact that use of frozen creams was less common than the use of water ices. In America, the conflict for priority was decided the other way. Starting from the early use of *ice cream* to cover any kind of ice, the general use of frozen mixtures containing cream of milk or milk gave this term the advantage, so that in America it is the accepted primary class-term—one has "ice cream" for dinner, one goes to get "ice cream" at a confectioner's, though in both cases the order may be for what are now called specifically "water ices". This is a fact, which will at once be recognized, though not noted in American dictionaries (see discussion of these definitions below, 3.22).

*Water ice*: The development of the French phrase *glace à l'eau* has been explained above. Though it appears in 18th century French works it has not been found in English works of the 18th century.

Presumably its use in English in the 19th century grew out of a necessity to particularize special classes by secondary class-terms, as

the term *cream* began to lose its wide and general use in the sense of a mixture. This was due to the encroachment of *custard* in its newly developed application to many mixtures earlier called *creams* (see above, 3.137). *Ice cream* partly ceased to cover naturally all kinds of ices, and a tendency rose to specialize *ice* in a secondary sense to mean ices made with fruit-juices and other watery mixtures, and to understand *ice cream* as meaning specifically ice made with cream of milk or milk mixtures. This is often the understanding in America at present. But to use a general term as a secondary term is not specific enough. In England, the adoption of *water ice* provided parallel secondary terms, *ice cream* and *water ice*, under the general class-term *ice*. In America, the general class-term *ice cream* was used also as a secondary term for cream of milk and milk mixtures, and *water ice* came into use to parallel the secondary sense.

*Frozen custard*: This further secondary sense, the use of which is very common in America, rose in consequence of the modern development of the word *custard*, covering, and in part supplanting, the older word *cream* (see 3. 137).

*Custard* specifically denotes a dish made by scalding milk and pouring it hot into beaten yolks of eggs, to which sugar and salt have been added, the mixture, when cold, being flavored, and the whites of the eggs, beaten and stiffened by cooking, being dispersed decoratively on the surface.

Examination of the recipes, old and modern, will show that the essential processes used in making *custard* enter into the making of *ice cream*. The domestic practice of freezing plain milk-custard, with cornstarch as a thickening, has led to a tendency to differentiate "frozen custard" from "ice cream" on the supposed basis that frozen custard has eggs in it and ice cream has not. The difference in flavor, which many persons dislike, is in part due to the taste of the yolks of eggs, not made up for by judicious flavoring, partly, indeed chiefly, to the taste due to the scalding when not rightly corrected, partly to the use of cornstarch as a thickening, often to the plainness of the mixture as often made. Both scalding and the use of yolks of eggs enter into the making of most sumptuously rich and expensive ice creams, which meet with cordial approval from the very persons who dislike what they would term "frozen custard", and whites of eggs are commonly added to the ice cream most generally approved by authors of American household cook-books, the so-called "Philadelphia ice cream".

There is no ground for regarding any "frozen custard" as not ice cream, however poor in flavor it may be. Frozen custard, of whatever kind, is ice cream; and poor "frozen custard", that is not agreeable to the eater, is merely poor ice cream.

*New York Ice cream*: A term peculiar to America formerly (and still, to some extent) applied to ice creams made with milk, eggs, cornstarch and sugar. Sometimes, but exceptionally, cream of milk was added to the mixture before cooking or to the "custard".

*Neapolitan Ice cream*: A term applied to a class of exceedingly rich creams made with boiled custard (milk, or cream of milk, yolks

of eggs and sugar), to which cream and flavoring is added when cold, or the beaten yolks of eggs in place of cream. With proper flavoring, the so-called "custard" taste is wholly unperceived. This general type of ice cream is the basis of some of the richest ice creams made. (See *French Ice cream* below.)

In current American trade and popular use: ice cream in "brick" form in three or more layers variously colored and flavored, often with a layer of water ice. In this use the term does not specify any particular kind of ice cream nor any special flavors, but only the form in which it is put up. Specification as to kind results in other phrasal compounds, as *French Neapolitan Ice cream*.

*French Ice cream*: An American trade term which, in both trade and popular usage, has largely supplanted *Neapolitan Ice cream* as the specificizing term for the class of ice cream made with milk, or cream of milk, yolks of eggs and sugar; more especially ice creams of this class so managed in the freezing process as to make them heavy and exceptionally smooth.

*Philadelphia Ice cream*: A term peculiar to America sometimes used—not uncommonly in cook-books of comparatively recent date—to specify ice cream made of a mixture into which cream of milk enters only or, if the cream of milk is very "thick", a proportion of two quarts of cream of milk to one pint of milk—as distinguished from the many mixtures used. The cream of milk may be scalded, but no yolks of eggs are used, though the beaten whites of eggs are sometimes added.

*Special terms*: Further comment is not necessary in regard to such terms as *sherbet*, *mousse*, *frappé*, *plombière*, etc., their use in English not differing in essentials from their use in French. In cook-books, some tendency to use *sherbet* as a class-term for water ices appears, though in general acceptance *sherbet* is still a water ice served as a soft ice, half a beverage—for example between the courses of a dinner: see the discussion of cook-books below.

### 3. 2. PRESENT USE.

3. 21. Evidence as to the origin and history of a term may not in itself suffice. This evidence must be tested, and, if necessary, corrected, by available evidence as to the use of the term in actual life, before complete understanding of present American use is formulated into a definition.

Such evidence will fall under the following heads:

- (a) Definitions in standard dictionaries of recent date. (3. 22).
- (b) Use of the term in recent or current literature. (3. 23).
- (c) Familiar use and understanding of the term by the average person. (3. 24).
- (d) Technical or other expert use. (3. 25).
- (e) Dialectal and cant uses. (3. 26).



### 3. 22. DICTIONARY DEFINITIONS.

3. 22. The standard dictionaries of recent date are the *New English Dictionary* of the English Philological Association, the *Webster* of 1913, the *Century* dated 1913, and the *Standard* of 1913.

The *New English Dictionary* represents British usage in general, taking account of only the most marked deviations in American usage. From the historical standpoint, it is the greatest work of reference ever published in any language. Its definition notes *ice* as the primary class-term including ice cream and water ice, and under *ice cream* it covers the variety of mixtures which contains milk or custard, its definition of *custard* covering mixtures of milk and eggs. Its definition of *ice cream* is at fault only in that it fails to note the use of the term in the 18th century as a primary term covering all classes of ices in the same way as *ice*.

The definitions in the three recent standard American dictionaries note the use of *ice* as a primary class-term to cover ice cream and water ice, but fail to note the characteristic American use of *ice cream* as the primary class-term. This is due to dependence on cook-books, British and American—the American cook-books often following the British (see 3. 253). The omission of so characteristic an American use is an error similar to that which leads to inclusion of British definitions of bird-names and failure to note use of those names for American birds. The fact that in America *ice cream* is universally used as the primary class-term may well rest on the indisputable evidence of familiar knowledge cited under 3. 24 below.

If in error in this omission, they are not in error as regards the variety of mixtures included under the term *ice cream*—their definitions indicating the use of cream-mixtures and custards, in full accord with the testimony of cook-books and household usage in America.

A further slight error may be noted in the *Standard*, the only dictionary which defines "Neapolitan ice cream". It gives the comparatively recent American application of this term to specify an ice arranged in layers of different colors, but fails to note its historical and specific application to ices made of rich custards as explained above.

A note may be added upon a point that is not trivial, although immaterial to the chief object of this discussion. Attention has already been called to the possible inaccuracy of the historical statement in the *New English Dictionary*, "Earlier term, iced cream." The *Century Dictionary* prefixes to its definition of *ice cream* the statement "Strictly iced cream." In view of the historical explanation of the formation of the compound, this statement is incorrect.

### 3. 23. RECENT AND CURRENT LITERATURE.

3. 23. This brief includes by general reference recent works and current references in the periodical press in support of the contention that *ice cream* in American usage is the primary class-term,



covering ices of whatever kind. Citations are not necessary, as such references are fully in accord with the evidence under the next head. The term *ice* or *ices* may appear in advertisements, cook-books, etc., but only as aping British and other foreign use.

### 3. 24. FAMILIAR USE.

3. 24. Familiar use and understanding of a term by the average person must be taken into careful consideration, because this may differ from the historical or technical use, and the law, in seeking an accurate definition, will aim to prevent the average person's committing or suffering wrong because of his ignorance.

In many cases, a person selected at random will have an incorrect, or only partially correct, understanding of a term—and a correct understanding will be found only among specially well-informed persons. For example, all know what *bread* means, but only a limited number could accurately define *corned beef*, and very few *sauce Tartare*. To take an instructive example, few persons except housekeepers in the United States know that mince-meat is often made without meat, and persons who have often eaten mince-meat made with meat will guess the percentage to be anywhere from 5 per cent. to 35 per cent.

No serious conflict exists between popular understanding and actual meaning of the term *ice cream*. Ice cream is so familiar an institution in the home, in the street, at the confectioner's—and, in the home, the male, as well as the female, members of the household, so generally engage in making it—that appeal can confidently be made to a universal understanding of its meaning. The dish is called typically *ice cream*, irrespective of its kinds, whether a cream-mixture or water ice. One makes "ice cream" for dinner, one goes to the "ice cream parlor" or confectioner for "ice cream," one buys it of the "ice cream man" in the street. In any of these cases "ice cream" may mean or include water ice.

Further, it is a fact universally known that the term *ice cream* covers a wide variety of mixtures. It is known that very rarely indeed, even in households that could well afford it, is *ice cream* made with cream of milk alone, because of the cost and as being too rich. It is very generally known that the amount of cream of milk may be varied according to the other ingredients used. It is very generally known that the addition of whites of eggs improves smoothness and that the addition of yolks enriches the mixture and improves its color. It is everywhere known that there is a gradation from rich mixtures down to use of milk only, in which cases in common domestic use cornstarch is added, and the mixture is brought to the boil. This, the poorest form of ice cream, is called "frozen custard". The only popular misapprehension is, as explained above, that the flavor disapproved of in this type of mixture is due to the presence of eggs, whereas it is due to the scalding or boiling in particular, to the presence of cornstarch, if used, and to the lack of compensating richness or intensity of flavoring, to cover the boiled taste.

## 3. 25. TECHNICAL USE.

3. 251. Technical use, that is use of the term by persons having special or expert knowledge of methods involved, may be held here to include its use:

- (a) By expert housekeepers.
- (b) By professional cooks.
- (c) By scientific experts in cookery.
- (d) By confectioners, and other manufacturers.

3. 252. The first two classes may be conveniently taken up together. The special knowledge of methods and recipes of expert housekeepers and professional cooks leads to no different use of the term from its general and popular use. They will have a more accurate knowledge of the proportions of mixtures, the uses of eggs, the difference between "poor" and "rich custard", and a more or less wide range of the innumerable fancy ice creams and frozen puddings with these names. But their use of the term is in nowise different from the general use.

3. 253. The same is true of scientific experts in cookery.

A special word is necessary here as to the evidence afforded by cook-books.

Cook-books, like other text-books, are built upon their predecessors and represent traditional usage. In addition, they constantly draw upon foreign cook-books, English and French, more particularly. A result of this is the use in some books of the characteristic British *ice* and *ices* for all ices. In others, the term *ices* is used to denote *water ices*. In others, no inclusive term is used as a heading. To give examples: Mrs. Lincoln uses "Ice cream and Sherbet", Mrs. Rorer "Ice creams and Sherbets", Mrs. Farmer "Ices, Ice creams, and other Frozen Desserts", Mrs. Berry "Ice cream and Ices", J. M. Hill "Ices". But in the text of these articles the familiar American use may appear. For example, Mrs. Lincoln, who heads her chapter "Ice cream and Sherbet", explaining that sherbet is water ice, uses *ice cream* none the less in its American generic sense (p. 546): "Fancy ice creams depend largely for their right to this name, upon the moulding. Any good recipe for a cream ice or water ice may be used."

As regards the range of mixtures, varying from those with cream of milk only to plain custard, the testimony of the cook-books is absolutely uniform.

Incidentally it may be added that in recent cook-books the number of special and fancy terms for particular kinds is largely increasing, including the French *parfaits* and the term *granite* derived from Italian *granita* directly or through the French.

This brief includes by general reference all American cook-books of recent or older date, in support of the definition of American use given below. (3. 3.)

3. 254. *Trade Use*.—This is used to cover all manufacturers, whether dealing in large quantities as wholesalers, or for their own

retail trade as the larger number of confectioners, restaurateurs, or caterers.

The trade use corresponds to that outlined above and defined below.

The article as a trade article is called *ice cream*. The term appears on signs, in advertisements, on bills of fare, on lists of varieties (including both cream ices and water ices) for the choice of customers, and as the general term in trade-reference as *The Ice Cream Trade Journal*.

In general, to the manufacturer the wide range of fancy names exist only as specifying varieties of certain staple kinds, these varieties differing only in form, special flavoring, method of service, or the like—the exception being where the name applied is understood as specifying a particular kind of mixture not included among the manufacturer's staple varieties. For him, *ice cream* divides into *cream ices* and *water ices*. Under water ices, fall those ices not made of cream-mixtures or custards—he subdivides them into four main classes, sherbets, granites, frappés, and punches. The cream ices are made of creams or custards. One class is made without stirring while freezing: this includes mousses, biscuits, and parfaits. The other class is made with stirring: this includes all the range of mixtures from "Philadelphia (or "straight cream") ice cream" through those made with various mixtures of cream of milk and milk. In any or all of these, he may use eggs in such a way as to make a custard, or otherwise in a way to ensure certain definite advantages—the white of eggs to ensure cohesion and smoothness, a modicum of yolk to take off the raw whiteness of white ice creams, as is done also by expert private housekeepers. Even in "Philadelphia ice cream", generally supposed to be without eggs, white of egg is added by some; this also is done by private housekeepers as an individual practice, as appears in cook-books. The most radical changes of recent years, generally accepted as good practice are:

(a) The giving up of the scalding of the cream of milk and milk (except in the making of ice creams of the so-called "custard" type, and even for these the cream of milk is no longer scalded as a rule)—due in part, no doubt, to the growing practice of pasteurization, but chiefly to the desire to avoid the scalded taste as unpalatable and therefore unpopular. Cream of milk similarly is seldom now scalded in private practice, though the cook-books direct scalding.

(b) The use of condensed milk (and, quite recently, milk powder) to give the desired "body" and "texture," supplanting to a large extent the use of egg yolks and starches for like purpose, and so satisfactorily meeting a growing preference for ice creams without a cooked taste. Similar use of condensed milk is not unusual in household practice and is noted in some cook-books.

(c) The use of a modicum of gelatin (or, more recently, vegetable gum), in place of whites of eggs and starches, to ensure cohesion and smoothness. This use of gelatin is noted in some cook-books, but its use in private practice, while not uncommon, is not as general as the trade use—due, without doubt, to the fact that ice cream

made in the household is so quickly consumed that there is less need of a "stabilizing" ingredient.

### 3. 26. DIALECTAL AND CANT USES.

3. 26. There are no cant or slang uses. Dialectic uses are confined to the differences between British and American usage, as regards the primary class meaning of *ice* and *ice cream* respectively, which have already been explained with sufficient fullness.

### 3. 3. DEFINITION OF AMERICAN USE OF THE TERM "ICE CREAM."

We reach now the following result: The history of the rise and use of the confection, the derivation of its name in English, French and Italian, the history of the use of the term from its origin to the present, the evidence afforded by standard dictionaries (except that they fail to note its universal use as a primary class-term in America), its use in current literature, the testimony of cook-books, the understanding and application of it by professional cooks, by private housekeepers, by manufacturers, and finally the universal popular use and understanding of the term, all coincide in confirming the accuracy of the following definition:

#### I. SPECIFIC USE.

Ice cream is a confection, or prepared food served as a delicacy, consisting of one of various "creams" or mixtures, as further defined below, frozen to a more or less rigid consistency in a suitable vessel or special contrivance, whether by packing in a freezing mixture (usually ice and common salt), or by air, brine, etc., chilled by modern appliances, or by other methods, with or without agitation or beating, during the process of freezing, by means of a dasher or similar contrivance, to ensure smoothness and the desired consistency.

**BASIS OF THE "CREAM" OR MIXTURE:** The basis of the "cream" or mixture may be a "cream" (as now understood), or a "custard" (in its recent sense, custards having been formerly also called "creams"), whence come two typical kinds of the confection.

(a) A cream as the basis of the first type, may have, as its basic ingredient either cream of milk only, preferably not too thick, in which case thinning with milk is advised to prevent over-richness, the product when thus containing a high percentage of butter-fat being termed "Philadelphia ice cream", (or, commonly in trade use, "straight cream ice cream") or cream of milk and milk, or cream of milk, milk and other ingredients—as condensed milk, eggs, etc.—, or milk and other ingredients, in proportions to produce a mixture of desired or available character as regards richness, healthfulness, or cost, varying from a high cream of milk content to plain milk. In the latter case, consistency is gained by adding whole eggs or egg yolks and often cornstarch, and bringing the mixture to a boil pro-

ducing a custard, which, when frozen, because of its characteristic taste is often called "frozen custard". This, as a cream with a custard basis forms a connecting link with the second type, from which it is distinguished by lack of richness.

(b) The second type of ice cream uses as its basis a custard of a desired degree of richness, made of cream of milk, milk, and eggs, and brought to the boil, the product being specifically known in cook-books as "Neapolitan ice cream" or "custard ice", and in trade use as "French ice cream" or as "frozen custard", according to the method employed in freezing. It is characteristically employed for elaborate fancy ice creams, "frozen puddings", etc., and includes among its varieties some of the richest ice creams.

USE OF EGGS: Eggs enter as above into all custard mixtures. To cream mixtures, the whites of eggs may be added for cohesion and smoothness, and a modicum of yolk for color, as individual preference may direct. This use of eggs, in both domestic and trade use, extends even to "Philadelphia ice cream", popularly supposed to be without eggs.

SWEETENING AND FLAVORING: The mixture, further, is sweetened and flavored, the flavoring consisting of essences, such as vanilla, wines or liqueurs, and fruit juice, fruit pulp, etc.

ADDITIONAL INGREDIENTS: There may further be added solid substances, as contributing to the flavor, or as diversifying the consistency, or as delicious in themselves, such as whole or ground nuts, candied fruit, powdered cake or bread, etc. When the confection consists chiefly of such solid substances held together by ice cream, a special class of *ice cream* results known as "frozen puddings". There may further be added, as a "stabilizer", in place of the whites of eggs, a small amount of gelatin or vegetable gum. In trade practice such addition is universal in ice creams of the first type described above.

CHARACTERISTICS OF THE FINISHED PRODUCT: After freezing, as above described, the confection may be served in the mass, or specially moulded into "bricks" or other shapes, or variously ornamented. In respect to its uses, ice cream is a sweet dish, made and enjoyed for its palatability, due to its flavor, consistency, and agreeable coldness, and for its attractive appearance to the eye, as the result of its frozen state, or as colored by its ingredients, or as specially colored, or as arranged in layers differently colored, or as shaped in special forms by moulds or otherwise, or as decorated with fruits, nuts, jelly, cake, or other edible or non-edible ornamentation, or as served in any way which taste or fancy may dictate.

## II. USE AS A SECONDARY CLASS TERM.

By natural development from the above sense, *ice cream* is used as a secondary class term, as meaning

A kind of ice cream (as above defined).

In this use, it forms a plural "ice creams", may take the indefinite article, "an ice cream", or a demonstrative pronoun, "This ice cream is better than that".



In this sense, it is employed as a parallel term, in general use, beside *water ice* denoting ices not made with creams or custards as a basis, or as a parallel term with *ice* in the special sense of *water ice*. In this sense, it has a synonym *cream ice*, in cook-book and trade usage, recently coined on the model of *water ice*. In limited, chiefly cook-book use, it is sometimes placed parallel with *sherbet*, applied as a class-term to denote *water ice*.

### III. USE AS A PRIMARY CLASS TERM.

By a natural development of the national preference for *ice creams* (Sense II) as against water ices, in American use, *ice cream* is universally employed as a primary class-term for all kinds of the confection as forming a class with the meaning:

Ice cream (sense II) or water ice as referred to without specification of kind.

Examples: "An ice cream freezer", "*The Ice Cream Trade Journal*", "An ice cream parlor", "To order ice cream for dinner", "We have ice cream every Sunday".

In this sense, the term has as a synonym the term *ice*, and *ices*, limited in America to book-use or as an individual adoption of British use, in which *ice* or *ices* is now the accepted primary class-term, though in the 18th century a use of *ice cream* like the American use was found.

Though so characteristic and universal an American usage, this sense is not noted in American dictionaries.

### 4. THE DEFINITION FROM A LEGAL STANDPOINT.

4. 1. The above definition is an attempt to state facts with, as nearly as possible, scientific fullness and accuracy. It is a philological statement. What consideration, supposing it to be complete and accurate, does it merit in a legal relation?

In discussing this question, the student of language does not presume to step outside his domain and assert what should or should not be a legal definition. On the other hand, he may with propriety assert that the law, if it be the law, and not an arbitrary assumption of legal power, shall not trespass outside its proper bounds into the province of philology and frame an inaccurate definition contrary to the facts and contradicting right judgment.

In other matters of scientific fact, the law does not presume to determine. It could not and would not rule that the sun goes round the earth or that a flower or animal shall be considered as belonging to a particular genus to which it does not belong. In the case of the meaning of a given term, however, it is not so easy to see that the law cannot arbitrarily alter or modify accepted use, or infringe the right of a person to use it in its proper accepted meaning. None the less, the accepted use of a term is as much a fact of nature as the constituents of a given chemical compound. As such it is extrajudicial, and outside the power of the law to determine.

Nor does the law presume to determine it. Legislators may so presume, but such action is not in accordance with the law. If the question of the place of the earth in the solar system or the genus of a flower came before the law in a legal relation, it would be decided by appeal to scientific authority, and if the facts were not known in any individual case, they would have to be ascertained by scientific methods. So similarly the definition of the meaning of a word. It is well known that in foreign countries questions of language—meaning and usage—are settled by prescription, but they are so settled by a properly constituted scientific tribunal. Lacking an official tribunal, the law should take process upon such a statement of conclusions as the above definition, supported by presentation of the historic evidence from which those conclusions were derived, and exposition of the methods and principles employed in reaching them.

4. 2. It is plain that any scientific conclusion with respect to the meaning of the name of a thing cannot be of force, or come into consideration, with regard to what the law may rule as regards the thing itself. For example, if it came to be recognized that the drinking of beer or wine or spirits were detrimental to the general interests of society, the legislature might act to terminate or restrict the drinking of these liquors. But if, while legislators were doing this, they should presume to tamper with the names of these liquors, and should ordain by statute that *beer* should hereafter be applied only to a malt liquor of not more than three per cent alcohol, such an enactment would be purely arbitrary. On the other hand if a brewer should attempt to sell a so-called "beer" of twenty per cent alcohol, a Court might at once put a stop to it, basing its decision on the history and present acceptance of the term *beer*. The fact of the meaning of *beer* would be taken into account in the decision precisely as any other fact of nature would be in a case of different kind, for example the analysis of an ore under dispute.

4. 3. The above definition aims to supply the information which should be the basis of any law relating to the meaning and use of the term *ice cream* or to the composition of ice cream.

\*In questions of the kind under discussion, the law in the interests of the public should first ask:

Is the substance or product sold under a given name properly included under that name?

Obviously, if it is not what the name calls for, a fraud is being committed, and the law should intervene; but if the product sold is what the name calls for then no fraud is being committed and there is no reason or excuse for interference on this ground.

\*However, even when the product sold is what the name calls for the law might properly inquire as to the suitability of the substance or product itself, and its next question is:

Is the product in any way prejudicial to health because of the presence of any of the ingredients called for or permitted by the name?

If the answer is in the affirmative, then the use or future disuse



of such ingredients is properly subject to a legal enactment,—either regulatory or prohibitive.

It is at this point that legislation often goes seriously astray. Acting on private judgment, on a superficial knowledge of the facts, or without taking into account the economic aspects of the matter as regards consumer and manufacturer alike, the persons responsible for such legislation sometimes fix arbitrary standards.

An illustration of this important point is afforded by the legislation concerning mincemeat. It is suggested that a standard of ten per cent meat content be fixed legally on the supposition that mincemeat recipes in private and domestic use contain roughly on the average ten per cent. This suggestion fails to take account of the fact that recipes for private use are for small quantities that may be used quickly or may be at intervals dosed with spirits, whereas if a manufacturer used ten per cent meat content, he is constrained to use a high percentage of spirits, or artificial preservatives. There is the further error that mincemeat is thought to be valued for its nutritive qualities, whereas, except in lumber camps or similar use (and even there), it is valued as a sweet dish—and that the entire history of mincemeat shows a decrease in meat content and increase of fruit content, as fruit became more plentiful and inexpensive, because of superior palatability, to the point of discarding meat altogether. There is again the further error of supposing that meat is generally used in mincemeat in America, whereas some thirty per cent of housekeepers in America, and nearly all in England and the British possessions, do not use it at all.

4. 4. The above definition aims to supply the information necessary to answer the questions, as stated above, which may properly be asked by the law. It has been pointed out that legislators may easily go astray in fixing an arbitrary standard, though with the best intentions. But they may commit a still more serious error, and ordain that a manufactured product shall not bear the name usually applied to it unless it conform to that new and arbitrary standard. This may not only be to the prejudice from an economic standpoint of the best interests of the consumer in general, but is also in contradiction of the law, which cannot arbitrarily modify the accepted use of a term in contradiction of the facts of accepted usage. To cite again the illustration used above, legislation fixing a definite percentage of meat in mincemeat should unquestionably be declared illegal.

4. 5. It remains to apply these questions to the question of the determination of the ingredients of the confection, ice cream, with which this brief is concerned.

\*The above definition attempts to state the actual facts as regards the meaning and inclusion of the term.

\*Any attempt to limit the meaning of the term *ice cream* to a narrower inclusion by an arbitrary ruling would be as unwise and as unjust as it would be flatly in contravention of the historic and present acceptance of the term.

When, with purity (freedom from ingredients not called for by

name), wholesomeness and possibility of deception in mind, the individual legislator, committee, commission, or other person or body, considers the desirability of creating a standard for ice cream in the public interest, and it is ruled that ice cream should consist of cream of milk alone with sweetening and flavoring, the arguments urged are:

1. The term *ice cream* calls for cream of milk.
2. The admission of eggs causes the compound to be a custard.
3. The use of cream of milk makes the product more nutritious, and therefore more wholesome.
4. Enforced use of cream of milk will prevent the manufacturer, including the manufacturing retailer, such as the confectioner and caterer, from using less costly substitutes for it.

An examination of these arguments will show, so far as the interests of the buyer or consumer are concerned, that not one of them is justified as regards the meaning of the term, or as preventing a fraud upon the consumer, or as ensuring him a more wholesome comestible, or as serving the interests of the public in general as regards economy or opportunity at pleasure for enjoyment. On the other hand, there is a serious infringement of the rights of the manufacturer.

The arguments may be taken up in order:

1. The term *ice cream* does not call for *cream of milk*. The whole history of the term, as above traced, shows this to be a flagrant error.
2. The use of custard as a base produces a special type of ice cream running back to an early period in its history and including in its varieties some of the richest and most delicious ice creams. The use of whites and yolks of eggs for specific purposes in other creams is not unwholesome, and perpetrates no fraud upon the consumer—not to speak of their frequent use in domestic practice.
3. The use of cream of milk alone may render ice cream more rich in fat, but not therefore more wholesome, or affording greater benefit if it affect the quantity that may be safely eaten. Moreover ice cream is not generally eaten for nutritiousness. And if nutritiousness is to be considered, why bar ice creams in which eggs are used, as in the whole class of Neapolitan or French ice creams, or ice creams in which the solids of milk that afford more nutriment than the fat of milk predominate?
4. The argument that enforced use of cream of milk will prevent use of less costly substitutes by the manufacturer is directly met by the fact that at present many ice creams not made of cream of milk alone are for good reasons costly to make and to buy. But more important than this, the argument raises the economic question. Use of cream of milk alone would at once establish a minimum manufacturing cost much higher than it is at present, whereas now a wide range of perfectly wholesome and palatable mixtures is possible with a corresponding range of prices. Continuous fraud upon purchasers is no more probable at present than with any other article of merchandise—whereas to enforce use of cream of milk only would,

by limiting variety and by raising the minimum price, restrict the customer's opportunity for enjoyment. It would be as inequitable and economically as unwise as to enact that clothing should consist of wool only and not of mixed wool and cotton or of cotton.

Such answers the definition provides to the type of argument commonly urged, proving such arguments to be only superficially cogent.

The definition, however, does more than this. It fully supports the manufacturer's contention that the enactment of a standard for ice cream is an infringement by inequitable legislation of his rights.

1. The origin, subsequent history, and present use of the term *ice cream* show that it has always covered a wide range of mixtures, the term *cream* meaning a mixture when it was used in the compound, and the range of mixtures being the same today, as regards use of cream of milk, milk, and eggs, as when the confection originated.

2. The fixing of an arbitrary standard is not to debar the use of prejudicial or unwholesome mixtures. The mixtures debarred are perfectly wholesome. The arbitrary standard aims to confer upon the consumer a benefit that is wholly illusory, since by limiting variety and by raising the minimum price, it limits his opportunity for enjoyment. Under the definition, the manufacturer claims the right to offer a wide range of wholesome ice creams.

3. The definition shows that trade practice and domestic practice run parallel as regards use of basic ingredients in the mixtures used. It is inequitable to lay restrictions upon the manufacturer which are counter to general practice and understanding in the making and use of the confection.

Upon the facts as stated in the definition and the merits of the case, it is contended that the fixing of an arbitrary standard upon the constitution of the mixtures used in making ice cream, as regards the proportions of cream of milk used, the use or disuse of eggs, or other limitation upon the nature of those mixtures in contradiction of historic practice, both domestic and trade, is inadvisable in view of the interests of the consumer and inequitable as regards the rights of the manufacturer.

# APPENDICES

Containing Selected Citations Illustrating the History  
of the Words

## CREAM AND ICE CREAM.

- I. CREAM in the Sense of "Mixture."
- II. ICE CREAM.



I.

CREAM IN THE SENSE OF "MIXTURE."

(39)





## I. CREAM IN THE SENSE OF "MIXTURE."

## A. DEFINITIONS FROM DICTIONARIES.

(The dictionaries quoted are the *New English Dictionary* of the English Philological Society, the supreme historical authority, which has been in process of preparation and publication over fifty years, with the cooperation of readers and scholars all over the world, and the three standard American dictionaries which have issued editions of recent date.)

(1893) *New English Dictionary* (Part C), Oxford.

(*Cream*) 2. *transf. a.* A fancy dish or sweet of which cream is an ingredient, or which has the appearance and consistency of cream, as almond, chocolate, iced cream, etc.—

b. A substance or liquor of cream-like consistency; *esp.* a decoction (of barley, etc.): cf. CREMOR. *Obs.*

c. The part of a liquid which gathers on the top like the cream on milk; a 'head' of scum, froth, etc.—

d. A cream-like preparation used cosmetically. See also COLD CREAM.

1913. *Century Dictionary and Encyclopedia.*

(*Cream*) 5. A sweetmeat or dish prepared from cream, or of such consistency as to resemble cream: as, an iced cream, or ice-cream; a chocolate cream.

1913. Funk and Wagnalls, *Standard Dictionary*, New York.

(*Cream*) A delicacy for the table resembling cream or made in part of it; as ice-cream, whipped cream; also, a bonbon containing a cream-like substance.

1913. *Webster's International Dictionary.*

(*Cream*) 2. Hence, - - - [Def. 1. defines cream of milk] A fancy dish or confection prepared from cream, etc., or so as to resemble cream, as a kind of filling for cake made with cream, or corn-starch, eggs, etc.

## B. QUOTATIONS.

The following quotations are submitted in proof of the early and wide-spread use of *cream* to denote a mixed sweet dish that may or may not contain cream of milk, or even milk, and often contains eggs, etc. This use began long before the practice of freezing such creams (the earliest quotation in English—a mixture not containing cream of milk dates in the 15th century), and comes down to our own day. The present use is proved by quotation from a typical American cook-book, but all American and English cook-books are included by general reference.

It is also shown that the creams were chilled or iced before serving, before the practice of freezing came in. Also, that the same creams used before this practice came in were eaten frozen or unfrozen, proving that *cream* in *ice cream* has the sense of mixture (see also quotations for *ice cream* under II).

It will be noted that the term *cream* included mixtures now termed *custards*, a recent development of the term *custard*.

A number of foreign references from French, Spanish, German, Dutch, are first given to show the general Continental use of *cream* in the sense of mixture, followed by the English references.

## 1. QUOTATIONS FROM CONTINENTAL LANGUAGES.

1676. *L'Escole parfaite des  
Officiers de la Bouche.*

Paris.

p. 210.

## CREME BLANCHE.

Boil together a pint of good milk, a good-sized piece of sugar and the whites of two eggs well beaten, and a little orange-flower water. Stir it well until it begins to thicken, then let it cool and put it through a fine strainer.

1676. *L'Escole parfaite des  
Officiers de la Bouche.*

Paris.

p. 210.

## CREME DE LAIT D'AMANDES.

Shell and bray in a mortar a pound of sweet almonds, moistening them with fresh milk; when they are macerated pour over them a pint of milk and mix well; heat almost to the boiling point: strain through a cloth, pressing thoroughly, and take the milk produced, with a good-sized piece of sugar, and boil it until it begins to thicken. Add a little orange-flavor water and serve the Cream cold.

1683. *Le Cuisinier François.*

Rouen.

p. 111.

## CRÈME DE PISTACHES.

Take a handful of pounded pistache nuts and a quart of milk and boil them. When they are nearly done, mix 6 egg yolks with your pistache nuts and a little fresh butter: put the whole into a saucepan with a quantity of sugar and a little salt. If you wish add musk or amber, but very little musk: beat it well, and serve.

1737. *De Ge oefende en Ervaren Keuken-Meester.*

[The Practical &amp; Experienced Cook.]

Amsterdam.

p. 145.

## 22. Room van Pistasjes.

## [PISTACHE CREAM.]

Put a handful of peeled Pistache nuts in  $\frac{1}{2}$  pint of Milk, let them cook together with a little flour stirred in, when it is nearly done beat in the yolks of 6 Eggs with some of the nuts and a little fresh Butter. Put it all in a dish with a good deal of Sugar and a little Salt. (If you wish add Musk or Ambergris to the sugar, but very little Musk); mix it well together, . . . and serve. . . .

1740. *Le Nouveau Cuisinier Royal et Bourgeois.*

M. [François] Massialot.

Paris.

v. 1, p. 276.

## CRÈME D'AMANDES.

After having shelled the almonds pass them through bolting-cloth with a little water to make almond milk. A great many almonds are necessary. Make a cream whether of pistache nuts, or chocolate, or any other flavor, with only a little flour, sugar and orange-flower water, without eggs or milk, but a little salt and much sugar. Cook it with the almond milk until it is the proper consistency.

1742. *Le Cuisinier Moderne.*

Vincent La Chappelle.

The Hague.

vol. 3, p. 264.

## CRÈME DU VIN DE RHIN.

Put into a saucepan about a bottle of Rhine wine, add a stick of cinnamon, the rind of a lemon, and a piece of sugar: when it boils add about 12 yolks of eggs well beaten, and a glass of water. Stir it until the Cream thickens, strain through a cloth into the dish in which you serve it cold.

1742. *Le Cuisinier Moderne.*

Vincent La Chappelle.

The Hague.

vol. 3, p. 267.

## CRÈME À L'ITALIENNE.

## CRÈME BRULÉE.

## CRÈME BLANCHE LEGÈRE.

All made with milk, eggs and flavoring, cooked in a double boiler, and served cold. The Crème Brulée has caramel added, and the Crème blanche has only the whites of the eggs.

1747. *Arte de Roposteria.*

Juan de La Mata.

Madrid.

p. 138.

## NATA A LA INGLESA.

[cream]

Pound thoroughly in a stone mortar, 2 egg yolks, 3 ounces of sugar, 2 ounces of candied lemon and orange peel, and 5 ounces of pistache nuts well cleaned. When all these are well blended, mix with them a quart of milk and cook them, stirring constantly. After cooking add 5 or 6 drops of orange flower water, and putting it in a dish, cook it again until it is of a golden brown color.

[This recipe is identical with the one given in *Le Confiturier*, 1791.]

1747. *Arte de Reposteria.*

Juan de La Mata.

Madrid.

p. 139.

## NATA A LA PORTUGUESA.

[cream]

Mix with a pint of milk half a pint of good cream, the yolks of 3 eggs, powdered sugar to taste, a small piece of cinnamon, and the same amount of candied lemon and orange peel cut in small pieces. Let it boil, stirring constantly, until it appears ready to adhere to the sides of the kettle or saucepan.

1759. *Le Manuel des Offices de Bouche.*

Paris.

p. 352.

## ENTREMETS DE CRESMES.

- A l'Anglaise. Cream boiled with sugar, cinnamon, coriander & lemon, mixed with a little flour and 6 yolks of eggs put through a bolting cloth and cooked in a bain-marie.
- De thé. Cream, tea and sugar, a little flour, 6 yolks.
- De café. Same with coffee.
- Douce. Cream, sugar and white of eggs.
- A l'Espagnole. With wine and eggs.
- A l'eau. Like "l'Anglaise" except made with water instead of cream.
- A la Reine. Do. do. except with whites of eggs, instead of yolks.
- Au chevreuille. Like the one "a l'eau" except the addition of half a pound of pounded almonds.
- Vierge. The beaten whites of 6 eggs.
- Bourguignotte. Like "l'Anglaise" with pounded macaroons added after cooking and some marmalade.
- Polonoise. Cream, sugar, vanilla, 8 egg yolks.
- Au chocolat. Cream, sugar, chocolate and egg yolks.
- Grillée. Cream cooked with spices, mixed with caramel & 6 egg yolks.
- Various other forms with rice, etc.

1772. *Dictionnaire Portatif de Cuisine, etc.*

Paris.

p. 62.

CHOCOLAT (CRÈME DE)  
In a Bain-marie.

1 oz. of grated chocolate mixed with the yolks of 4 eggs and a little milk, add to it 1 pt. of cream, and half a pt. of milk. Sugar to taste; have some boiling water in a casserole, set the dish containing your cream in it, and cover with another dish, and do not remove it until the cream is thickened.

1772. *Dictionnaire Portatif de Cuisine, etc.*

Paris.

p. 199.

CRÈME LÉGÈRE.

Boil for  $\frac{1}{4}$  of an hour a pt. of milk and  $\frac{1}{8}$  of a pound of sugar. Stir in the whites of 2 eggs well beaten, and let it boil once or twice more beating all the while. Let it cool and serve, sprinkling with orange-flower water and powdering with sugar.

1772. *De Volmaakte Hollandische Keuken-Meid.*

Written by a Well-known Lady of The Hague.

Amsterdam.

part 6, p. 55.

[LEMON CREAM.]

Take the juice of 4 lemons,  $\frac{3}{4}$  of a pound of loaf sugar mixed with the whites of 4 eggs, stir it until it thickens, then take it from the fire and put in a few drops of orange-flower water, . . .

1772. *De Volmaakte Hollandische Keuken-Meid.*

Written by a Well-known Lady of The Hague.

Amsterdam.

part 6, p. 59.

CRÈME BRULÉE.  
[Caramel Cream.]

Half a pint of sweet cream, 3 eggs in some sugar, place it on the fire; when it thickens, take a red hot shovel and color it.

1775. *Les Dons de Comus, ou L'Art de la Cuisine.*

Paris.

vol. 3, p. 191.

CRACKLING CREAM.  
*Crème en Croquet.*

Boil 1 pint of milk with a little sugar. Beat up the yolks of 6 eggs on a plate. Mix with your milk, and set the dish on the stove. Stir constantly until the cream thickens all through. Set the dish on a tripod to cook slowly. When it is done pass a red hot shovel over it to dry it. Then cut it in bits with a knife, and set it in the oven to dry out so that it will be crisp, like a spice cake. While cooking it sprinkle on a grating of lemon rind.

[This same recipe is given in a number of English books about the same period.]

1775. *Les Dons de Comus, ou L'Art de la Cuisine.*

Paris.

vol. 3, p. 187.

## BLACK CREAM.

Boil a pint of milk with sugar. Take a piece of charcoal the size of an egg and break it up in a goblet with a little of the milk, until the latter is quite black. Break into a dish the yolks of 8 eggs. Mix in your cream and enough of the black milk to give sufficient color. Strain through a doubled napkin, and cook in a double boiler. 5 or 6 bitter almonds may be added. Serve cold. It may be covered with the white of egg whipped and iced.



1777. *Allerneuestes Kochbuch.*

Mr. Jean Neubauer.

Vienna.

p. 405.

AN ORANGE CREAM.

Take 6 Oranges, rub three of them on some sugar into a dish, pour over the juice of the six, beat up 8 egg yolks and one whole egg and add with a small piece of sugar and a little white wine, strain it through a hair sieve, set it over boiling hot water till it thickens.

1777. *Allerneuestes Kochbuch.*

Mr. Jean Neubauer.

Vienna.

p. 404.

EINE CREM ROJALE.

Put some bitter and sweet almond paste and some almond biscuits into a dish with sweet Cream, rub a Lemon on some sugar, a little cinnamon, a small piece of sugar, some egg yolks and one whole egg, when it is all well mixed strain through a hair sieve, set it over a moderate fire, cook until it begins to thicken, let it cool and serve.

1791. *Le Confiteur.*

Paris.

p. 273.

CRÈME VELOUTÉE.

1 pt. of sweet cream and the same quantity of milk, 4 oz. of sugar, boil together, and when it is reduced one-half take it off the fire; then dissolve some rennet about the size of a pea in 2 or 3 spoonfuls of milk with 5 or 6 drops of orange-flower water. Mix all together, put it over hot coals covering with a plate, on which place a few coals to keep it warm, which causes it to thicken. Serve cold.

1791. *Le Confiteur.*

Paris.

p. 275.

## CRÈME VIERGE.

1 pt. of good milk and half a pt. of cream, 3 or 4 oz. of sugar, 4 bitter almond cakes; boil them together gently, and when reduced about  $\frac{1}{4}$  put in the whites of 2 eggs well beaten and 5 or 6 drops of orange-flower water, or the zest of a lemon. Stir constantly over a slow fire until it begins to thicken; serve cold.

1791. *Le Confiteur.*

Paris.

p. 278.

## PORTUGUESE CREAM.

Take a pt. of milk and half the quantity of cream, the yolks of 3 eggs with some sugar, a piece of cinnamon and the same amount of lemon peel cut small. Cook till it thickens to a cream, stirring all the time. Serve cold.

1791. *Le Confiteur.*

Paris.

p. 280.

## LEMON CREAM.

The juice of 6 lemons with some of the zest mixed in a glassful of water with the whites of 6 fresh eggs, all well mixed and strained several times through a cloth; cook over hot coals, without allowing it to boil, when thick take it off and serve it cold.

1791. *Le Confiteur.*

Paris.

CRÈME CROQUANTE.  
(Crackling Cream.)

Mix gradually the yolks of 4 eggs with a pint of milk; add the grated rind of a lemon and sugar to taste; stir over a moderate fire until it is thick. Reduce the fire a little and take up the cream in spoonfuls putting it around the edge of a dish, taking care not to

burn it, but seeing that it sticks to the dish. Color it with a hot shovel; then detach the cream with a knife and pile it up on the same dish; set it in the oven to crisp.

1791. *Le Confiturier.*

Paris.

p. 275-6.

CRÈME VIERGE, another way.

3 half-pints of good cream boil over a slow fire with 3 or 4 oz. of sugar until it is reduced about  $\frac{1}{4}$ . When nearly cold, add rennet the size of a pea, 5 or 6 drops of orange-flower water, mix thoroughly and let it set.

1791. *Le Confiturier.*

Paris.

p. 277.

CHOCOLATE CREAM.

$\frac{1}{2}$  pt. of cream to a pint of milk, the yolks of 2 eggs and 3 oz. of sugar; mix and boil until reduced about  $\frac{1}{4}$ , stirring constantly; then add enough grated chocolate to give it taste and color; let it boil up again 5 or 6 times, and let it cool before serving.

1791. *Le Confiturier.*

Paris.

p. 277.

CRÈME DE PISTACHES.

Heat 2 or 3 ounces of good Pistache nuts, shell them and bray them in a mortar with a little lemon peel. Take a quart of good milk, two egg yolks and 4 ounces of sugar, beat them all together and add the pistache nuts, boil the whole over a moderate fire, taking care to stir it well until the Cream is cooked, but not too thick. Put it on a china dish to serve cold.

1791. *Le Confiturier.*

Paris.

p. 278.

## CRÈME À L'ANGLAISE.

Take 2 yolks of eggs, 4 ounces of sugar, 2 ounces of lemon peel and orange peel candied, and 5 ounces of peeled pistache nuts; pound them well together and dilute with a quart of milk; cook over a slow fire stirring constantly. When it is done add 5 or 6 drops of orange-flower water, put it on a dish that can be placed on the fire until the edges are crisp, then sugar it well and color it golden brown with a red hot shovel.

1791. *Le Confiturier.*

Paris.

p. 279.

## CRÈME GLACÉE.

After having made a Cream [in the usual way with a quart of milk and half the amount of cream, the yolks of two or three eggs, flavoring, etc.] when it is ready to serve, glacé it with icing made of powdered sugar, the white of an egg, and a few drops of orange-flower water. Spread it over the Cream and dry it out with a hot stove-lid.

1791. *Le Confiturier.*

Paris.

p. 283.

## CRÈME À L'EAU.

Beat up 4 fresh eggs whole, with a quart of water, the rind of a lemon cut very fine, also the juice, and 4 ounces of sugar: pass it through a napkin 2 or 3 times, cook it on a dish over a very slow fire stirring it until it makes a thick cream—take it off while hot but serve it cold.

## 2. QUOTATIONS FROM WORKS IN ENGLISH.

c. 1430. *Two Fifteenth Century Cookery Books from the Harleian Mss.*

[Edited by Thos. Austin, London, 1888.]

p. 21.

## CREM DE COLOURE.

Take an make thicke Milke of Almaundys, and do it in a potte, and sette it ouer the fyre: then take a fayre Canvas, an put it ther-on and late renne out the Water; then take the halfyndele, and put it in a pot of erbe; then take the other halfyndele and parte it [in] to and make the half below and do ther-yn Wyn, Sugre, Clowes, Maces powder of Canelle, take [blank in Ms.] and grynd a lytel in a mortar; than temper it vppe wyth almaunde mylke, and do euery of hem in a potte an loke that it be y-like chargeaunt and sette it ouer the fyre, an boyle it a lytyl, an serue forth.

c. 1430. *Two Fifteenth Century Cookery Books from the Harleian Mss.*

[Edited by Thos. Austin, London, 1888.]

p. 33.

## CREME BASTARDE.

Take the whyte of Eyroun a grete hepe, and putte it on a panne ful of Mylke, and let it boyle; then sesyn it so with Salt an honey a lytel, then lat hit kele, and draw it thorw a straynoure, an take fayre Cowe mylke an draw yt with-all and seson it with Sugre, and loke that it be poynant and doucet: and serue it forth for a potage or for a gode Bakyn mete, wheder that thou wolt.

c. 1430. *Two Fifteenth Century Cookery Books from the Harleian Mss.*

[Edited by Thos. Austin, London, 1888.]

p. 91.

## FRIED CREME DE ALMONDES.

Take almondes and blanche hem, and wassh hem in faire water and Bray hem small in a mortar with faire water: And then take

hem and the water togedre som-what thik, and drawe hem through a streynour into a faire potte, And set hem ouer the fire, and lete hem boyle ones; And then take hem downe, and cast thereto Salte, and lete stande a forlonge wey or ij And cast a litull vinegre therto: And then cast hit on a faire linnen cloth that is faire wassh and the water y-wronge oute there-of; and cast hit all abroad with the ladull and lete men hold the cloth al abroad; and then take a ladill and draw vndur the cloth and draw away the water all that a man may. And then gadur all the creme togidur in the clothe; And then take the cloth with the creme, and hange hit vppon a pyn, and lete the water droppe out two or thre houres or more; And then take hit of the cloth, and putte hit in a bolt of tre, And caste Sugur ynogh thereto and a litul salt, And if hit wex to thik, take swete wyne and temper hit with ale; And then take reysons of coraunce clene y-wassh and put hem there-in, that they be not seyn; And whan hit is dressed in maner of mortrewes take rede anneys in confite or elles leues of Burage, and set thereon in a dissh.

1649. *The English House-Wife.*

G. M[arkham.]

5th ed. London.

p. 111.

[No heading.]

Take a pint of the sweetest and thickest creame that can be gotten, and set it on the fire in a very cleane scowred skillet, and put into it Sugar, Cynamon, and a Nutmeg cut into four quarters, and so boyle it well: then take the yelks of four Eggs, and take of the slimes, and beat them well with a little sweet Creame: then take the four quarters of the Nutmegge out of the Cream, then put in the egges, and stir it exceedingly, till it be thick: then take a fine Manchet [loaf of bread], and cut it into thin shives, as much as will cover a dish bottome, and holding it in your hand, powr half the Cream into the dish: then lay your bread over it, and cover the bread with the rest of the creame, and so let it stand till it be cold: then strew it over with Canaway Confets, and pricke up some Cinamon Confets and some slic't blates; or for want thereof, scrape all over it some Sugar and trim the sides of the dish with sugar.

1660. *The Accomplisht Cook, or The Art & Mystery of Cookery.*

Robert May.

London.

ALMOND CREAM.

Take  $\frac{1}{2}$  lb. of Almonds paste beaten with rose-water and strain it with a qt. of cream; put it in a skillet with a stick of cinnamon and boil it, stirring constantly; when it is boiled thick, put sugar to it and serve it up cold.

1660. *The Accomplisht Cook, or The Art & Mystery of Cookery.*

Robert May.

London.

ALMOND CREAM otherways.

Take thick almond milk made with fair spring water and boil it a little, put to it a little salt and vinegar, cast it into a clean strainer and hang it upon a pin over a dish- . . . . . add to it beaten sugar and a little sack, muskedine or white wine.

1660. *The Accomplisht Cook, or The Art & Mystery of Cookery.*

Robert May.

London.

ALMOND CREAM otherways.

Take a qt. of cream, boil it over night, then in the morning have  $\frac{1}{2}$  lb. of almonds blanchd and fine beaten, strain them with the cream and put to it  $\frac{1}{4}$  lb. of double refined sugar, a little rose-water, a little fine ginger and cinnamon finely searced, mix together. dish it with fine carved sippets round about it.

1660. *The Accomplisht Cook, or The Art and Mystery of Cookery.*

Robert May.

London.

SNOW CREAM.

1 quart of cream, the whites of 6 eggs, a quartern of rose-water,  $\frac{1}{4}$  pound of double refined sugar beaten together. Have a fine silver dish with a penny manchets the bottom and upper crust being



taken away and made fast with paste to the bottom of the dish and a streight sprig of rosemary set in the middle of it, beat the cream and eggs together and as it froatheth take it off with a spoon and lay it on the bread and rosemary.

To make SNOW CREAM otherwayes with Almonds.

Take 1 quart of good sweet cream, and  $\frac{1}{4}$  pound of almond paste fine beaten with rose-water and stirred in  $\frac{1}{2}$  pint of white wine, put some orange-peel to it, and slic't nutmeg and 3 sprigs of rosemary, let it stand 2 or 3 hours in steep; then put some double refined sugar to it and strain it into a bason, beat it till it froath, and as the froath riseth take it off with a spoon.

1688. *London Gazette*, No. 2383/2 (N. E. D.)

All such Fruits, Iced Creams, and such other Varieties as the Season afforded.

1690. *Young Cooks Monitor*.

By M. H.

London.

p. 27.

To make LEMMON CREAM.

Take 6 Lemmons and pare them very thin and steep the paring in a quart of fair water that it may be very strong of the Lemmon-peel, then squeeze in the Juyce of the Lemmon; then add to it 3 spoonfuls of Orange-Flower water and the whites of 8 Eggs and 2 Yelks beaten very well then strain it Under a hair Sieve and sweeten to your Pallett with fine Loaf-Sugar and set it on a fire keeping it stirred all one way till it be a thick Cream.

ORANGE CREAM.

do. do.

ALMOND CREAM.

[ $\frac{1}{2}$  pound Jordan almonds, 1 qt. Cream.]

C. 1700. Author of the Journey to London, *The Art of Cookery*.  
In Imitation of Horace's Art of Poetry, p. 89.

Tis the Desert that graces all the Feast  
For an ill end disparages the rest:  
A thousand things well done, and one forgot,  
Defaces Obligation by that Blot.  
Make your transparent Sweet-meats truly Nice,  
With *Indian* Sugar and *Arabian* Spice:  
And let your various Creams incircled be  
With swelling Fruit just ravish'd from the Tree.

1709. *The Queen's Royal Cookery.*

By T. Hall, Free Cook of London.

London.

p. 173.

## LEMON CREAM.

Take 1 pint of Barley-Water and 6 Eggs, leaving out half their Whites; beat and mix them well together, then squeeze in the juice of 3 Lemons, and the Peel of one pared very thin and cut into small pieces; sweeten to your Taste, and set it over a slow Fire. Keep stirring all the While, and when it is as thick as Cream strain it, and let it cool.

1709. *The Queen's Royal Cookery.*

By T. Hall, Free Cook of London.

London.

## ALMOND CREAM.

Take  $\frac{1}{2}$  a pound of Jordan Almonds and blanch them, beat them in a mortar with 4 spoonfuls of Rose or Orange-flower water; then take 1 quart of Cream and put to the Almonds and stir them well together; strain through a Hair sieve and set it on a slow Fire and let it just boil. Take it off and sweeten it and put it out in little China dishes, and when cold serve it to the Table.

1709. *The Queen's Royal Cookery.*

By T. Hall, Free Cook of London.

London.

## SACK CREAM.

Whilst 3 pts of cream is boiling on the Fire, beat the yolks of 8 or 9 eggs with some Sack, and put in your Skillet keeping it stirring till it come to a curd, then run it through a strainer and save your curd being severed from your whey, season it with Cinnamon, Ginger, Nutmeg, Sugar and Rosewater.

1723. *The Cook's and Confectioner's Dictionary.*

Revised & Recommended by John Nott, Cook to His Grace, the Duke of Bolton.

London.

[Recipe.] 209.

## CREAM.

Take yolks of 4 or 5 Eggs beat them well in a Stew-pan with a little Flour, pouring on Milk by degrees to the quantity of a Quart; then put in a small Stick of Cinnamon some candy'd and some green Lemon-peel cut small. Set the Cream on the Furnace; stir it continually that it do not stick to the Bottom. When it is boil'd, set a Dish upon the Furnace and pour the Cream into it and let it boil again till it sticks to the side of the Dish, then set it aside and sugar it well on the top, heat the Fire-shovel red hot and brown the Cream with it to give it a fine golden Colour.

1723. *The Cook's and Confectioner's Dictionary.*

Revised & Recommended by John Nott, Cook to His Grace, the Duke of Bolton.

London.

[Recipe.] 216.

## ITALIAN CREAM.

Take 2 quarts of milk, boil it with sugar, a little salt and a stick of cinnamon; when it is boiling, take a large dish and a sieve into which put the yolks of 10 new laid eggs; strain both eggs and milk through it 3 or 4 times; then put the dish into a baking cover, pour all into it, and put fire over and under till your Cream becomes very thick.

1723. *The Cook's and Confectioner's Dictionary.*

Revised and Recommended by John Nott, Cook to His Grace, the Duke of Bolton.

London.

[Recipe.] 217.

## LEMON CREAM.

Pare 3 fair smooth lemons and squeeze out the juice, cover it close for 2 or 3 hours; when it tastes of the peel put to it the yolks of 2 eggs and the whites of 4. Beat this well with 2 spoonfuls of orange-

flower water, then put a pint of fair water to all these, strain and sweeten, set it over a gentle fire, stirring it constantly till it is as thick as cream.

1723. *The Cook's and Confectioner's Dictionary.*

Revised and Recommended by John Nott, Cook to His Grace, the Duke of Bolton.

[Recipe.] 218.

London.

MAIDEN CREAM.

Take the Whites of 10 Eggs, whip them to a Froth; put them in a Sauce pan with Milk, Orange Flower-water and Sugar. Set a Plate over a Stow put in a little Cinnamon, beat up your Cream very well and pour it into the Plate. Then brown it with a red hot Shovel and serve it.

1724. *Collection of Above 300 Recipes.*

London.

part I, p. 59.

ORANGE CREAM.

Take 4 oranges and grate the Peel into a Pt. of water, then squeeze the Juice into the water; beat the Yolks of 4 Eggs very well and put it in the water; sweeten it very well with double refin'd Sugar; press all hard through a strong Strainer, set it on the Fire, and stir it carefully all one way 'till 'tis as thick as Cream.

1724. *Collection of Above 300 Recipes.*

London.

part I, p. 59.

ALMOND CREAM.

Take half a pound of good Almonds, blanch and beat them very fine, with Orange-flower water; take a Qt. of Cream boil'd cool'd and sweeten'd, put the Almonds into it, and when they are mixed strain it through a Canvas, then stir it over the Fire, 'till it thickens and pour it into Glasses; if you love it richly Perfum'd, put in a Grain of Ambergreese.

1724. *Collection of Above 300 Recipes.*

London.

part I, p. 61.

## POSTATIA-CREAM.

Take an Ounce of the Kernels of Postatia-Nut, beat them small with 2 spoonfuls of Orange-flower water, and 4 Yolks of Eggs; boil a Qt. of Cream, and mix all together. When the Cream is so cool it will not curdle the Eggs, thicken it over the Fire with great care, . . .

1724. *Collection of Above 300 Recipes.*

London.

part II, p. 28.

## WHITE LEMON CREAM.

Take almost a Pint of Water, and the Whites of nine Eggs very well beaten, and the Juice of four large Lemons or five if they be not large; then strain it through a Jelly Bag and put to it half a Pound of double-refin'd Sugar beat and sifted; set it on a soft Fire and keep it constantly stirring all one way, till it is as thick as Jelly; pour it out quick.

1724. *Collection of Above 300 Recipes.*

London.

part II, p. 29.

LEMON CREAM, *the Best Way.*

Take 3 smooth fair Lemons, pare them, and squeeze out the juice; cut the Peel in small Pieces, and put it to the Juice; for 2 or 3 hours cover it close; and when it tastes of the Peel add to it the Whites of 4 Eggs and the Yolks of 2, beat this well with 2 spoonfuls of Orange-flower water, then put all these to a pt. of fair water, and sweeten it with double-refin'd Sugar; set it over a gentle Fire and stir it carefully 'till 'tis as thick as Cream.

1724. *Collection of Above 300 Recipes.*

London.

part II, p. 29.

## CREAM FLUMMERY.

Take a pt. of cream, 3 spoonfuls of Rice Flower, very fine ground or beat, and sifted till it is small, 3 oz. of sugar, and 2 oz. of Almonds, beat small; beat them with some spoonfuls of milk for fear of oiling, the whites of 3 eggs beat; strain the cream and eggs to the almonds, and set it on the fire, and stir it all one way, till it is thick and smooth as a custard; then pour it into deep Glasses that when 'tis cold it may turn out in picked Shapes.

1725. *Court Cookery.*

London.

p. 194.

## MAIDS CREAM.

Take the Whites of 5 Eggs, whisk them to a Froth, and put them in a Saucepan with refin'd Sugar, Milk and Orange Flower Water; set your Plate on a Stove with a little Cinnamon, and pour your Cream when it's well beat into the Plate. When it is enough [done] brown it with a red hot Shovel or Iron.

1730. *The Complete Practical Cook.*

Charles Carter.

London.

p. 185.

## FOR LEMON CREAM.

Take the Lemon Peel of 2 or 3 Lemons and bruise it and steep it all Night in Cream or Milk: Boil it in the Morning and turn it with the Juice of Lemon; put in a little Orange flower water and a little Sack and sweeten it with fine Sugar and a Musk Confit or two. You may colour some of this as Jellies, and this may be iced likewise.

1739. *The House-keepers' Pocket-Book and Compleat Family Cook.*

Mrs. Sarah Harrison.

London.

p. 158.

## LEMON CREAM.

Take the juice of 4 large Lemons and  $\frac{1}{2}$  pint of Water and a Pound of double refin'd Sugar beat fine, and the Whites of 7 Eggs and the Yolk of  $1\frac{1}{2}$  beat well; strain and set it over a gentle fire, skim and stir it all the While and when it is very hot, but not boiling, pour it into your Glasses.

[2 other recipes, one calling for 1 quart of Cream.]

1739. *House-keeper's Pocket-Book, etc.*

Sarah Harrison.

London.

p. 173.

## SNOW CREAM.

Take a pt. of the thickest cream and sweeten to your taste; take the whites of eggs and beat to a Froth; then take a Sprig of Rosemary and beat it in as the Snow rises, take it off & lay it in the Dish.

1753. *The Compleat Housewife.*

E. Smith.

London.

p. 185.

## LEMON CREAM.

Take 5 large lemons and squeeze out the juice, and the whites of 6 eggs well beaten, 10 oz. double-refin'd sugar beaten fine, 20 spoonfuls of spring water; mix and strain through a jelly bag, set it over a gentle fire, skim well; when it is as hot as you can bear your finger in it take off and pour in glasses.



1753. *The Compleat Housewife.*

E. Smith.

London.

p. 185.

ORANGE CREAM.

Take a pint of the juice of Seville oranges, put to it the yolks of 6 eggs, the whites of 4, and strain; add 1 lb. of sugar; set on the fire and put the peel of  $\frac{1}{2}$  orange into it, keep stirring and when almost ready to boil take out the orange peel, and pour it in glasses.

1765. *The Art of Cookery, Made Plain & Easy.*

By a Lady.

London.

p. 284.

RATAFIA CREAM.

Take 6 large laurel leaves, boil them in a Quart of thick cream; when it is boiled throw away the leaves; beat the yolks of 5 eggs with a little cold cream and sugar to taste, then thicken the cream with your eggs, set it over the fire again, but don't let it boil.

1765. *The Art of Cookery, Made Plain & Easy.*

By a Lady.

London.

p. 284.

A FINE CREAM.

Take a Pt. of cream, sweeten it to your taste, grate a little nutmeg, put in a spoonful of orange-flower water, and rose water, and 2 spoonfuls of sack, beat up 4 eggs, but only 2 whites; stir all together over the fire till it is thick.

1765. *The Art of Cookery, Made Plain & Easy.*

By a Lady.

London.

p. 283.

ALMOND CREAM.

Take a Qt. of cream, boil it with half a nutmeg grated, a blade or two of mace, a bit of lemon-peel, and sweeten it to your taste; then blanch  $\frac{1}{2}$  lb. of Almonds, beat them very fine with a spoonful of orange-flower or rose-water, take the whites of 9 eggs well beaten and strain them to your almonds, beat them together, rub through a coarse hair-sieve; mix with your cream, set it on the fire, and stir till it boils.

1765. *The Art of Cookery, Made Plain & Easy.*

By a Lady.

London.

p. 283.

BLANCHED CREAM.

Take a Qt. of the thickest, sweetest cream, season it with fine sugar & orange-flower water and boil it; then beat the whites of 20 eggs with a little cold cream, take out the treddles which you must do by straining it after it is beat, and while the cream is on the fire and boils, pour in your eggs, stirring it all the time one way till it comes to a thick curd, then take it up and pass through a hair-sieve, then beat it very well till cold.

1765. *The Art of Cookery, Made Plain & Easy.*

By a Lady.

London.

p. 281.

LEMON CREAM.

Juice and rinds of 3-4 Lemons, add the whites of 6 Eggs, beat well together, sweeten and cook over a gentle fire till thick.

## ORANGE CREAM.

Made with the yolks of 6 eggs, and the whites of 4.

## GOOSEBERRY CREAM.

1 Quart of gooseberry pulp, 6 eggs well-beaten, and a little butter, cooked all together.

1773. *The Experienced English Housekeeper.*

Elizabeth Raffald.

London.

p. 232.

## PISTACHO CREAM.

Take  $\frac{1}{2}$  lb. of pistacho nuts, take out the kernels, beat them in a mortar with a spoonful of brandy, put them in a tossing pan with a pt. of cream and the yolks of 2 eggs beat fine, stir it gently over a slow fire till it grows thick, then put it in a soup plate, when cold stick it all over with small pieces [of nuts].

1773. *The Experienced English Housekeeper.*

Elizabeth Raffald.

London.

p. 236.

## KING WILLIAM'S CREAM.

Beat the whites of 3 eggs very well, then squeeze out the juice of 2 large or 3 small lemons, take 2 ounces more than the weight of the juice of double refined sugar and mix it together with 2 or 3 drops of orange flower water and 5 or 6 spoonfuls of fair spring water; when all the sugar is melted, put in the whites of the eggs into a pan and the juice and set it over a slow fire, and keep stirring till you find it thicken, then strain it through a coarse cloth quick into the dish.

1790. *English Housewifery.*

Elizabeth Moxon.

Leeds.

p. 116.

## CHOCOLATE CREAM.

Take 4 oz. of chocolate more or less, grate it and boil it in a pint of cream, mill it well with a chocolate stick; take the yolks of 2 eggs and beat well, leaving out the strain, put to them 3 or 4 spoonfuls of cream, mix and set on the fire and stir until it thickens, but do not let it boil. Sweeten to taste and keep stirring till it be cold.

1790. *A Collection of Ordinances & Regulations for the Government of the Royal Household, etc., etc., also Receipts in Ancient Cookery.*

London.

[The recipes are of much earlier date than the publication, but the exact period is not specified.]

p. 463.

## CREME BOYLE.

Take creme of cove mylke, and zolkes of eyren beten, and saffron and medel alle togedur, and boyle hit that hit be stonding, and dresse hit up stondynge of leches in dishes and plant hit with floures of borage and serve hit forth.

1790. *A Collection of Ordinances & Regulations for the Government of the Royal Household, etc., etc., also Receipts in Ancient Cookery.*

London.

p. 447.

## CREM OF ALMONDE MYLK.

Take almonde mylk and boyle hit, and when hit is boylt take hit from the fyre and springe thereon a lytel vynegur; then take and cast hit on a clothe, and cast theron sugar, and when hit is colde gedur hit together, and leche hit in dysches and serve hit forthe.

1793. *The French Family Cook.*

Translated from the French.

London.

p. 244.

## ITALIAN CREAM.

Put 3 gills of milk into a stew-pan, and boil it, then add the peel of a lemon, some coriander seed, a bit of cinnamon, a little more than half a quartern of sugar, two or three grains of salt, and let it boil till half consumed; let it cool, and have ready in another stew-pan a little flour beat up with the yolks of 6 eggs; stir in your cream by little and little; strain through a sieve, and set in a dish in hot water over the fire till the cream be set. Color with a salamander.

[Number of recipes in this book, all using a little flour, and some rennet to make the cream set.]

1795. *Practice of Cookery, Pastry, &c., &c.*

Mrs. Frazer.

2d Ed.

Edinburgh.

## ALMOND CREAM.

Boil a choppin [qt.] of cream with cinnamon and lemon-peel, blanch and beat  $\frac{1}{2}$  lb. of sweet almonds with a little sugar; cast the whites of 6 eggs; mix them with the almonds and strain them through a sieve. Mix in the boiled cream gradually amongst them, and put on the fire stirring it all one way—sweeten to your taste and take out the cinnamon and lemon-peel.

1800. *Cookery & Pastry.*

Mrs. Maciver.

Edinburgh.

p. 114.

## SWEET ALMOND CREAM.

Boil a chopin of cream with cinnamon and lemon-peel; blanch and beat  $\frac{1}{2}$  lb. of sweet almonds; wet them with a little rose-water as

you beat them; beat the whites of 8 eggs very well, mix them with the almonds and thrust them through a searce, mix in the boiled cream gradually amongst them and put them on the fire, stirring all one way; do not let it boil; sweeten to your taste, taking out the sticks of cinnamon and the lemon-peel.

1800. *Cookery & Pastry.*

Mrs. Maciver.

Edinburgh.

p. 114.

CLEAR LEMON CREAM.

Pare 4 large lemons very thin; lay the parings into half a mutchkin of water; squeeze the juice of the lemons into it, and let it stand one minute; strain it off and boil it up with a pound of double refined sugar and a gill of rosewater; take the whites of 9 eggs—you must not whip them too much, else they will frothe; strain the whites through a searce, and mix them with the liquor by degrees for fear of curdling; put it on a very clear fire, let it be scalding hot and put it in glasses.

ORANGE CREAM.

Made the same way.

RATAFIA CREAM.

Laurel leaves boiled in cream, strained out and the cream mixed with egg yolks and sugar.

1900. *Boston Cook Book.*

Mary J. Lincoln.

The ingredients of the various creams in this typical cook book are given to illustrate the present use of the term *cream* in its old general use:

Page 360. Andermatt Cream.  $\frac{1}{2}$  cup rice, 3 cups boiling milk, 1 cup preserved fruits, 1 pint thick cream. Serve with sponge cake.

Page 355. Plain Bavarian Cream.  $\frac{1}{4}$  box gelatine, water, 1 pint cream, 1 dozen lady-fingers, sugar, vanilla, wine, boiling water.

Page 357. Norfolk Cream. 1 pound candied plums, plain Bavarian cream, one third of which is colored with cochineal, half a cup of cherries.

Page 377. Orange Cream for Cake. Rind of half, juice of one, orange, lemon juice, water, corn-starch, yolk of one egg, butter.

Page 377. Orange and Cocoanut Cream for Cake. One egg, one cup of whipped cream, sugar, cocoanut, orange.

Page 378. Cocoanut and Raisin Cream. One cup of raisins, half a cup almonds, half a cup of grated cocoanut, white of one egg beaten stiff.

Page 535. Coffee Cream. One pint milk, sugar, salt, coffee, junket tablet. Eat with sugar and cream.

Page 389. Cream for Cream Cakes and Eclairs. One pint milk, corn-starch, three eggs, sugar, salt or butter.

Page 375. Cream for Cream Pies. One pint milk, two eggs, sugar, salt, butter, flour, flavoring.

Page 346. Spanish Cream. Gelatine, eggs, sugar, salt, milk, white of three eggs, vanilla.

Page 346. Italian Cream. Same ingredients, differently mixed.

Page 534. Prune Cream. Prune juice, sugar, gelatine, water, one pint cream.

Page 345. Tapioca Cream. Tapioca, one pint milk, yolks of two eggs, sugar, salt, whites of two eggs, vanilla.

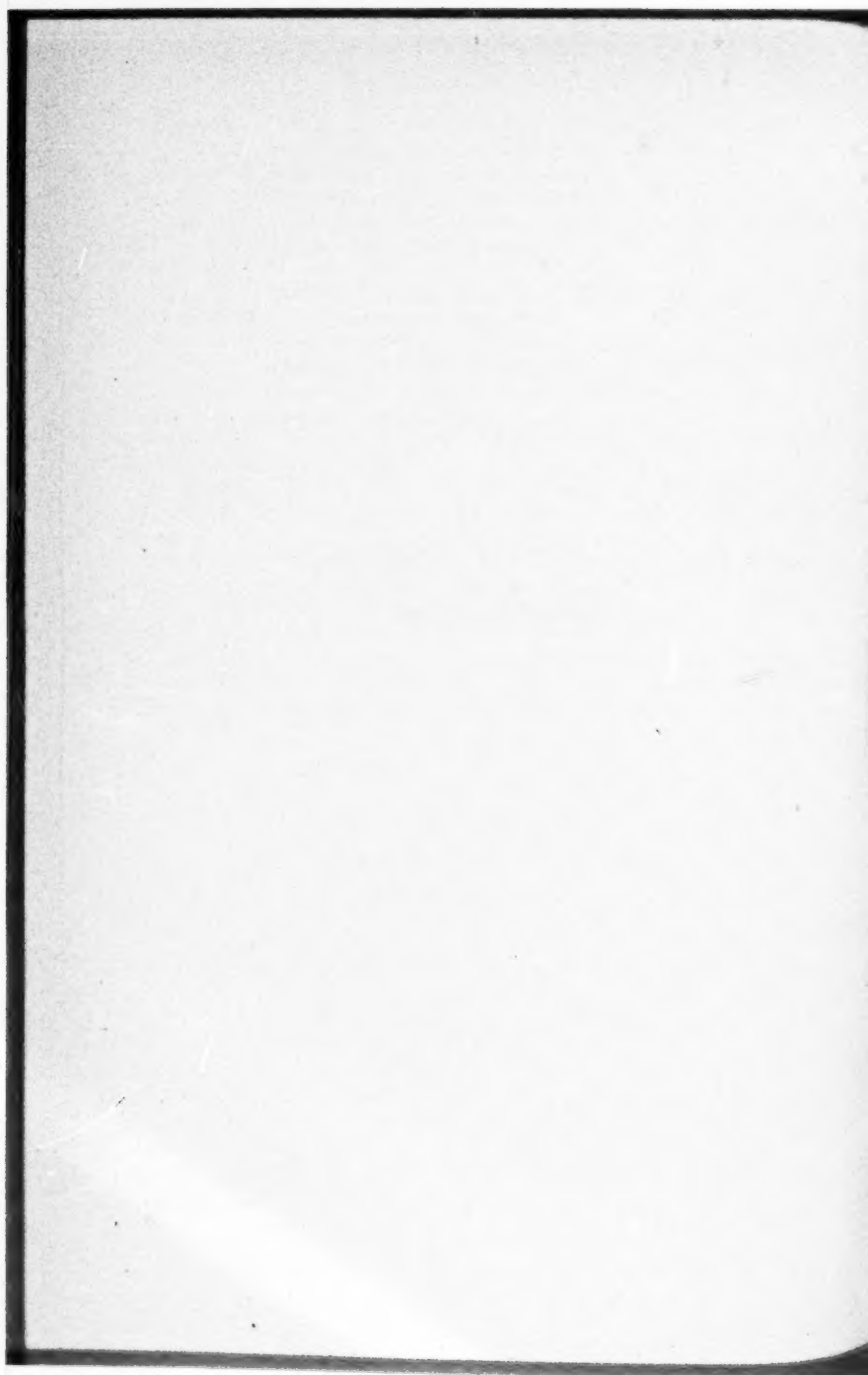
Page 349. Velvet Cream. Gelatine, sherry, lemon, sugar, one and a half pints of cream.

And so forth. All cook books contain recipes for creams covering a wide variety of mixtures, with and without cream of milk or milk, of the same character as in the 17th and earlier centuries.



II.  
ICE CREAM.

(69)



## II. ICE CREAM.

## A. DEFINITIONS FROM DICTIONARIES.

The same dictionaries are used as in the case of *cream* above.

Correction of the definitions in certain details will be found in the text (see 3.22), namely that the New English Dictionary, (cf. also Century Dictionary) in saying "Earlier term, *iced cream*" is not right if it is implied that *iced cream* necessarily preceded *ice cream*, and that this dictionary should have noted the 18th century British use of *ice cream* to include all ices in cook-book use; also, that the American dictionaries should have noted the universal American use of *ice cream* to cover all ices as a general class.

All the dictionaries attest the fact of the wide range of mixtures included under *ice cream*—mixtures made of cream of milk, milk or what we now call *custard*.

(1893) *New English Dictionary, Oxford.*

(*Ice*) 5. *a.* A frozen confection. Now with *an* and *pl.*

(In French the *pl. glaces* in this sense was admitted by the Acad. in 1762; but as late as 1825 it was asserted to be incorrect to say *une glace*.)

*Ice-cream.* A compound of flavoured and sweetened cream or custard, congealed by being stirred or revolved in a vessel surrounded by a freezing mixture. (Earlier term, *iced cream*.)

1913. *Century Dictionary and Encyclopedia.*

(*Ice*) 3. A frozen confection consisting (*a*) of sweetened and flavored cream, milk, or custard (cream-ice, ice-cream), or (*b*) of the sweetened juice of various fruits (water-ice).

(*Ice-cream* (Strictly *iced cream*) A confection made by congealing variously flavored cream or custard in a vessel surrounded with a freezing-mixture.

1913. Funk and Wagnall, *Standard Dictionary*, New York.

(*Ice*) 2. A frozen dessert, as ice-cream or water ice.

*Neapolitan ice*, ice-cream composed of several layers of various flavors.

*Ice-cream:* Cream, milk, or custard, sweetened and flavored, and frozen by a freezing-mixture, being usually agitated by a dasher in the process, to make it of uniform consistency.

*Neapolitan ice-cream*, same as *Neapolitan Ice*. See under *Ice*.

1913. *Webster's International Dictionary.*

(Ice) 2. A mixture of water, cream, custard, etc., sweetened, flavored, and artificially frozen.

(Ice-cream) Sweetened cream or custard flavored, as with fruit, chocolate, wine, etc., and beaten and frozen in a can which is rotated in a freezing mixture, usually of ice and salt.

## B. QUOTATIONS.

Quotations illustrating Continental practice, from which English practice was derived and which has continuously affected it, are given first, and then the English citations.

Attention is directed to the fact that the creams or mixtures used are of the same kind as before the practice of freezing came in; that the creams might be eaten frozen or unfrozen; and in particular to the clear evidence of the wide variety of mixtures used.

A few quotations from recent American cook-books are included to show the use of custard ice creams, and more particularly to attest the existence of the main class of creams made with custard, often called typically "Neapolitan ice cream." The whole range of American cook-books is, however, included by general reference in support of the application of the term *ice cream* in domestic and general practice to a wide range of mixtures with varied proportions of cream of milk, milk, eggs, etc.

1. FOREIGN QUOTATIONS ILLUSTRATING THE MEANING OF THE TERM  
*Ice Cream.*

1737. Pierre-Jacques Ribon *L'Ecole Parfaite Des Officiers De Bouche.*

Paris.

(Title of section) On the way to Freeze all sorts of Delicious "Waters" (eaux délicieuses).

(The "waters" are fruit juice mixtures, and they are frozen in bottles packed in ice and salt. The use of the word "eau" is perhaps doubtful, in that it may mean "water" in a similar sense to our "rose-water," etc., or fruit-juice. The mixtures are similar in composition to our water ices.)

1742. *Le Cuisinier Moderne.*

Vincent La Chapelle.

The Hague.

p. 220.

## CRÈME DE PISTACHE À LA GLACE.

Take a suitable quantity of pistache nuts; put them in boiling water to remove the skins, and plunge them into fresh water; dry them in a napkin and pound them with a little sweet cream. Put into a saucepan 1 or 2 pints of cream, season with sugar, stick of cinnamon and the rind of a lemon: when this boils, add your pistache nuts and the yolks of 5 eggs well beaten. Put it back on the fire to cook the eggs, and when cooked add little by little the juice of spinach to color it. Strain through a cloth and put it in freezing moulds.

1742. *Le Cuisinier Moderne.*

Vincent La Chapelle.

The Hague.

p. 220.

## TOURTES À LA GLACE.

Freezing moulds of tin are needed, one or two feet in height and five or six inches round. For a Tourte à la glace take at least a pint of cream, put it in saucepan with a good-sized piece of sugar and the rind of a lemon; boil it, add 3 yolks of eggs to a pint, a stick of cinnamon as big as your finger and boil till they are well mixed. Put it through a sieve or bolting-cloth, and let it cool, then freeze it. . . . Take apricots cut in half peeled and powdered with sugar, put them into a freezing tin, and when your cream is frozen, serve it on a crust of almond paste and put your apricots on top.

1742. *Le Cuisinier Moderne.*

Vincent La Chapelle.

The Hague.

p. 221.

## CRÈME DE CHOCOLAT À L'ITALIENNE.

Put 3 or 4 goblets of water into a chocolate pot, with  $\frac{1}{2}$  or  $\frac{3}{4}$  of a pound of chocolate & a piece of sugar, and boil. Empty it into a saucepan and mix with it 1 or 2 yolks of eggs, cooking it a little with the eggs. Whip it up, and as the mousse forms put it in a sieve. Put the mousse into glasses, set them in moulds and freeze.

1742. *Le Cuisinier Moderne.*

Vincent La Chapelle.

The Hague.

p. 221.

## CRÈME AU CHOCOLAT.

Put into a saucepan a couple of pints of cream, some sugar, a stick of cinnamon, the rind of a lemon and half a pound of chocolate: bring it to a boil stirring well with a wooden spoon. Strain through a cloth, let it cool, and beat it well with an egg whip. As it becomes a mousse, take it up on a hair sieve and set on a plate to drain. Continue until you have enough to make *fromages à la glace* or to fill small moulds. You can make *fromages à la glace* without whipping the mixture.

1742. *Le Cuisinier Moderne.*

Vincent La Chapelle.

The Hague.

p. 222.

## TURK'S HEAD À LA CRÈME À LA GLACE FOUETTÉE.

Whip 8 or 10 pints of sweet cream, and as the mousse forms put it in a sieve. When you have as much as you need, add a moderate

amount of powdered sugar, mix it in with a skimmer, put it in a Turk's head mould and freeze it.

You can also use sour cream in place of sweet; it is as good in its way as the other.

1742. *Le Cuisinier Moderne.*

Vincent La Chapelle.

The Hague.

p. 234.

CRÈME DE CITRON.

Cook some lemons in water, mash them and put them into a saucepan with sugar, a bottle of Rhine wine or Champagne. Test the flavor, and let it cool. Add the yolks of 12 eggs, and strain through a cloth. Cook in a bain-marie. This cream may also be frozen. Oranges may be prepared in the same way, and with cream in place of wine.

1742. *Le Cuisinier Moderne.*

Vincent La Chapelle.

The Hague.

p. 234.

CRÈME D'ABRICOTS.

Cook the apricots in sugar and strain through a sieve. Add good Rhine wine or Champagne, let it cool and then add the yolks of eggs: for a small dish at least a dozen. [Used like the Lemon Cream either as a cooked custard or a frozen dessert.] Peaches and Plums may be treated the same way.

1747. *Arte de Roposteria.*

Jaun de La Mata.

Madrid.

p. 139.

ESPUMA DE LECHE.

Dissolve half a pound of sugar in a quarter of a gallon of good cow's milk with a little essence or a few pieces of cinnamon, leaving it to infuse awhile so that the cinnamon will impart its flavor to the



mixture. Then strain it through a napkin or sieve into a pan, adding to it half a pint of cream and beating it with a chocolate-stick until it froths, and continuing until there is enough for a dish.

This same froth may also be frozen in glasses made for the purpose so that they can be plunged in snow, in the same manner as Iced Beverages.

Many people make this Froth with sheep's milk in place of cow's milk, but it is necessary to cook this with eggs, about half a dozen to quarter of a gallon of milk, with some cream also if you wish, but that is not essential.

1759. Francois Toppens *La Cuisiniere Bourgeoise*, Brussels.

*Ice of all kinds.* In winter you serve winter syrups—and in summer you take waters for summer (eaux d'ete). Place these waters in ice-moulds, and, as they freeze, they should be stirred from time to time. When they are ready, serve them in goblets.

1759. *La Cuisiniere Bourgeoise*.

Brussels.

p. 449.

FROMAGE À LA GLACE.

Take a pint of double cream if you wish or any other kind that is good, half a pint of milk, the yolk of one egg, and three quarters of a pound of sugar; let them come to a boil 5 or 6 times and take it off the fire. Add some flavoring like orange-flower, bergamot, or lemon and put it in your mould and freeze it.

1768. *Le Cannameliste Français*.

Sieur Gilliers.

Nancy & Paris.

p. 150.

MOUSSE.

Take 2 pints of sweet cream, add to it 1 large cup of strong coffee or chocolate, and powdered sugar to your taste; mix well and strain into another dish. Whip the cream and as the mousse rises, take it up with a skimmer and put into a sieve to drain. Continue until you have enough for your glasses, fill them as full as possible and plunge in a pail of ice. This can be made of cream alone, letting some parings of lemon infuse in it, or flavoring with essences.

1768. *Le Cannameliste Français.*

Sieur Gilliers.

Nancy &amp; Paris.

p. 152.

## NEIGE [ICE CREAM.]

*Neige de crème ordinaire.*

Take 12 fresh eggs, separate the yolks and whites. Strain the yolks through a cloth, mix them with 2 pints of sweet cream; add a little lemon peel; cook over a slow fire stirring until it begins to rise; take it off and add powdered sugar to taste, and when it is dissolved pour the cream through a strainer into a dish. Let it cool and then freeze.

1768. *Le Cannameliste Français.*

Sieur Gilliers.

Nancy &amp; Paris.

p. 152.

## [PISTACHE ICE.]

*Neige de pistaches sans crème.*

When your pistache nuts have been shelled, pound them well with 1 or 2 slices of lime, adding a little water to prevent them from turning to oil; put them through a sieve with a spoon, mix with clarified sugar and a little water and freeze.

1768. *Le Cannameliste Français.*

Sieur Gilliers.

Nancy &amp; Paris.

p. 152.

## [LEMON ICE.]

*Neige de citrons.*

Take 12 fine lemons, dip in fresh water and dry at once. Have a piece of loaf sugar and grate 6 lemons on it, take off with a knife the part touched by the fruit, and put it in a pan with 1 pint of water, and squeeze in the juice of the lemons, adding clarified sugar to your taste; strain the whole through a cloth and put it in the freezer.

All fruit ices should have a couple of glasses of fine wine added to them.

1768. *Le Cannameliste Français.*

Sieur Gilliers.

Nancy &amp; Paris.

[ORANGE ICE.]

p. 153.

*Neige d'Orange.*

Take 12 oranges, grate the rinds as with the lemons, squeeze the juice and put into a bowl with a pint of water, and the grated rinds, together with the sugar on which they were grated; add the juice of 4 lemons, sweeten to taste, and strain through a cloth, . . . freeze. When partly frozen add a glass of gooseberry syrup.

1768. *Le Cannameliste Français.*

Sieur Gilliers.

Nancy &amp; Paris.

[LIME ICE.]

p. 153.

*Neige de cedra.*

Take 7 or 8 limes; grate the rinds on sugar; cut them in quarters and boil them until they are soft; cover with cold water, dry and put through a sieve; take this marmalade and mix in the grated rinds and a pint of water, add the juice of 12 lemons, sweeten to taste with clarified sugar, strain and freeze.

1768. *Le Cannameliste Français.*

Sieur Gilliers.

Nancy &amp; Paris.

[ORANGE-PEAR ICE.]

p. 154.

*Neige de bergamotte.*

Take 4 orange-pears and grate on sugar, put the grating into a dish with 2 pints of water; squeeze in the juice of 12 lemons, sweeten to taste, strain and freeze.

1768. *Le Cannameliste Français.*

Sieur Gilliers.

Nancy &amp; Paris.

p. 154.

## [APPLE ICE.]

*Neige de Pommes.*

Take 7 or 8 pippins or other apples, according to the shape of your moulds; peel and core them, and let them cook in a pint of water until they are soft; put them through a colander. Mix this marmalade with a little water, add the juice of 2 lemons and sweeten to taste, strain and freeze.

1768. *Le Cannameliste Français.*

Sieur Gilliers.

Nancy &amp; Paris.

p. 155.

## [PEACH ICE.]

*Neige de Pêches.*

12 ripe peaches; take off skins and stone them, put them through a sieve, mix the marmalade with a pint of water, and squeeze in the juice of 3 lemons, add sugar, strain and freeze.

1768. *Le Cannameliste Français.*

Sieur Gilliers.

Nancy &amp; Paris.

p. 156.

RASPBERRY ICE.  
STRAWBERRY ICE.  
CHERRY ICE.

2 or 3 pounds of fruit mashed through a colander, mixed with water and sugar, then frozen. The raspberry and strawberry have 1 pint of gooseberry juice added. The cherry ice has the juice of 2 lemons.

## POMEGRANATE ICE.

8 pomegranates, seeded and mashed through a colander. Add to the juice a bottle of Burgundy and the juice of 4 oranges, . . . etc.

1768. *Le Cannameliste Français.*

Sieur Gilliers.

Nancy &amp; Paris.

[APRICOT ICE.]

p. 156.

*Neige d'Abricots.*

24 apricots; after making them into marmalade pound 5 or 6 of the apricot kernels and mix in with it. Add the juice of 4 lemons, and finish like the other ices.

PLUM ICE.

do. do.

1768. *Le Cannameliste Français.*

Sieur Gilliers.

Nancy &amp; Paris.

[PEAR ICE.]

p. 156.

*Neige de poires.*

Take any kind of pear; cut them in two, stew them and cover with cold water when taken from the fire; then pare and core them, and put through a colander. Add a pint of water and the juice of 4 lemons; sweeten, strain and freeze.

1768. *Le Cannameliste Français.*

Sieur Gilliers.

Nancy &amp; Paris.

FILBERT ICE  
OR HAZEL-NUT ICE.

p. 158.

*Neige d'avelines de noix.*

1 pound of one or the other kind of nut; clean and dry them, crack and set them in a moderate oven to give them a pale brown color. When cold pound them well with a little cream; put the paste through the colander, mix it with a pint of cream, cook a little, sugar to taste, . . . etc.

1768. *Le Cannameliste Français.*

Sieur Gilliers.

Nancy &amp; Paris.

p. 159.

## [ARTICHOKE ICE.]

*Neige d'artichauts.*

3 or 4 artichokes, using only the bottoms. Cook them soft, mash them with a quarter of a pound of pistache nuts, one-fourth of a candied orange and a little cream. Mix the paste with a pint of cream, sweeten and freeze.

1768. *Le Cannameliste Français.*

Sieur Gilliers.

Nancy &amp; Paris.

p. 159.

## CHESTNUT ICE.

*Neige de marrons.*

Take off the outer shell of 24 chestnuts, bake them in the oven, put them into a napkin for a moment to get thoroughly heated; take off the inner skins, and pound them with a little cream. Mix the paste with a pint of cream and cook slightly, sweeten . . . and freeze.

1768. *Le Cannameliste Français.*

Sieur Gilliers.

Nancy &amp; Paris.

p. 160.

## [SHERRY ICE.]

*Neige de vin d'Espagne.*

Have your freezing mould in ice, put into it 2 bottles of sherry wine, two glasses of water and 2 glasses of Champagne, with 2 cups of clarified sugar, mix and freeze.

1768. *Le Cannameliste Français.*

Sieur Gilliers.

Nancy & Paris.

p. 161.

BITTER ALMOND ICE.

SAVOY BISCUIT ICE, ETC.

*Neige de biscuits d'amandes amères, de biscuits à la cuiller &c.*

Take one or the other of these cakes and dry them in the oven, pound them and put through the colander. Prepare a cream mousse without flavoring, put it in the freezer, and when partly frozen put in what you passed through the colander and mix lightly, place it in moulds and return to the ice.

1772. *Dictionnaire portatif de Cuisine d'Office et de Distillation.*

Paris.

p. 175 & p. 96 [new paging at letter M.]

LEMON ICE & ORANGE ICE IN SHAPES.

*Citrons (Glace de).*

Take marmalade of lemons and freeze as other ices, put it in moulds shaped like lemons, wrapped in paper and replace in ice.

*Orange Glaces en Fruits.*

Take orange marmalade and freeze it, put into the moulds and replace in ice.

1772. *Dictionnaire portatif de Cuisine d'Office et de Distillation.*

Paris.

p. 127.

[PEACH ICE, ETC.]

*Pêches (Cannelons de).*

Take ripe peaches, skin them and mix with a little water; strain through a colander pressing them well. Add 1½ pounds of sugar to a pint of juice, freeze, and put in moulds.



*Pêches (Glace de).*

Take very ripe peaches, skin them, mix with a little water, and let them infuse awhile; then strain through a colander pressing them well. Add a good deal of sugar and some of the pulp, and freeze.

1772. *Dictionnaire portatif de Cuisine d'Office et de Distillation.*

Paris.

p. 110.

## [COFFEE CREAMS, ETC.]

*Café (Cannelons de).* Mix 6 cups of clear, strong coffee with 1 pint of cream and sugar, put it in a mould, and work it in a freezer, . . . 1 pound of sugar in all.

*Café (Fromage de).* Put 6 ounces of coffee into a pint of water and boil and clear it as usual; boil 1 pint of cream, add 1 pound of sugar and your coffee; mix well and let it boil once or twice stirring all the time. Freeze.

*Café (Mousse de).* Make your coffee as for the Cannelons [*supra*]. Beat up the yolks of 6 eggs; add about 1 pint of cream and 1 pound of sugar; mix on the fire without boiling. When well mixed put it into goblets for the purpose, and put them in ice. If your mousse does not rise sufficiently add a little white of egg.

1772. *Dictionnaire portatif de Cuisine d'Office et de Distillation.*

Paris.

vol. 2, p. 38.

## MOUSSE DE CAFÉ.

Make some clear, strong coffee; add the yolks of fresh eggs, some cream and sugar. Mix on the fire without boiling, and then whip it well. Finish as with other mouses.

1772. *Dictionnaire portatif de Cuisine d'Office et de Distillation.*

Paris.

vol. 2, p. 38.

## MOUSSE À LA CRÈME.

Boil some cream with orange-flower water and sugar. When it is cold and well whipped, fill glasses or cups made for the purpose, and plunge in ice.

1772. *Dictionnaire portatif de Cuisine d'Office et de Distillation.*

Paris.

[APRICOT ICE.]

p. 6.

*Abricots (Cannelons de).*

Take 20 ripe apricots; take out the kernels and crack them; mix the fruit with about 3 half pints of water, and let it steep for two hours, then strain it pressing well to get out all the juice. Add about 1 pound of sugar, and put the mixture into the freezer, and when it is frozen put it in moulds.

1772. *Dictionnaire portatif de Cuisine d'Office et de Distillation.*

Paris.

[CHOCOLATE ICE CREAM, ETC.]

p. 162.

*Chocolat (Cannelons de).*

Boil 5 cups of chocolate with 1 pint of cream, and when sufficiently cooked freeze in a mould.

p. 164.

*Chocolat (Fromage de).*

Mix 6 ounces of powdered chocolate with a little water, add the yolks of 5 eggs, 3 quarters of a pound of sugar, 1 pint of cream. Put on the fire but do not let it boil. Freeze and put into moulds.

*Chocolat (Glace de).*

Boil  $\frac{1}{2}$  pound of chocolate with 1 pint of cream, the yolks of 4 eggs and a great deal of sugar, and proceed as with the *cannelons de chocolat*.

*Chocolat (Mousse de).*

Mix some chocolate with a little water add some yolks of eggs and a good deal of sugar and some cream. Heat the mixture but do not allow it to boil. Let it cool, and whip it with an egg beater. If the mousse does not make readily, add the white of egg. Put it into glasses and bury in ice.

1772. *Dictionnaire portatif de Cuisine, d'Office et de Distillation.*

Paris.

p. 274.

[STRAWBERRY ICE, ETC.]

*Fraises (Cannelons de).*

Mash 1 quart of gooseberries with 3 quarts of strawberries, mix with water and a great deal of sugar, strain and freeze in *cannelon* moulds.

*Fraises (Fromage de).*

Mash about 1 pound of fine strawberries, mix them with 1 pint of cream and 1 pound of pulverized sugar. Let it stand an hour, strain and freeze in a mould.

1772. *Dictionnaire portatif de Cuisine, d'Office et de Distillation.*

Paris.

p. 276.

[RASPBERRY ICE.]

*Framboises (Cannelons de).*

Crush with the raspberries 1 quart of gooseberries. Mix them with water and a great deal of sugar; pass the mixture through a colander, and freeze.

1772. *Dictionnaire portatif de Cuisine, d'Office et de Distillation.*

Paris.

p. 199.

[ICE CREAM.]

*Crème (Glace de).*

Boil a few sweet almonds in 1 pint of cream for a minute or two; take them out, add a little orange-flower water and some conserve, put in  $\frac{1}{2}$  pound of sugar and the grated rind of one whole lemon, mix with the cream and let it stand a quarter of an hour. Strain and freeze.

*Crème glacée.*

To  $\frac{1}{2}$  pint of cream add about 1 quart of milk  $\frac{1}{2}$  pound of sugar,  $\frac{1}{2}$  teaspoonful of orange-flower water. Put it into a suitable dish and freeze.

85

1772. *Dictionnaire portatif de Cuisine, d'Office et de Distillation.*

Paris.

p. 357.

GREEN GRAPE ICE.

*Verjus (Canelons de)*

Squeeze out the juice from green grapes and strain through a cloth; mix with an equal quantity of water, add  $\frac{1}{2}$  pound of sugar to a pint of liquid, freeze in *canelons* moulds.

*Verjus (Glace de).*

Take grapes almost ripe, mash and press through a colander, add a great deal of sugar, strain and freeze.

1791. *Le Confiturier.*

Paris.

p. 288.

FROMAGE GLACÉ.

Take three quarts of milk and one quart of cream, put it on the fire with sufficient sugar and two lemon rinds cut in strips. Let it cook, stirring all the time until it begins to thicken, then turn it into a silver dish: when it is cool put it into the freezing mould, and place it in a bucket full of ice. "You can tell when it is frozen by trying it with your finger."

1794. *Wienerisches bewahrtes Kochbuch.*

By Ignaz Gartler.

Edited & Improved by Barbara Hikmann.

Vienna.

p. 464.

No. 1294. [FROZEN GREEN GRAPE JUICE.]

*Agrass Gefrornes.*

Take as many green grapes as you choose, squeeze out the juice till you have enough, add sugar to it and 4 lemons, with some water, and then freeze it.

1794. *Wienerisches bewahrtes Kochbuch.*

By Ignaz Gartler.

Edited &amp; Improved by Barbara Hikmann.

Vienna.

p. 465.

No. 1300.

[CHOCOLATE CREAM.]

*Chokoladengefrornes.*

Mix together the yolks of 4 eggs,  $\frac{1}{4}$  pound of powdered Chocolate and  $\frac{1}{8}$  pound of sugar, cook a pint of cream with  $\frac{1}{4}$  ounce of whole vanilla bean, mix the eggs with the cooked cream and put through a hair sieve. Freeze like other creams.

1794. *Wienerisches bewahrtes Kochbuch.*

By Ignaz Gartler.

Edited &amp; Improved by Barbara Hikmann.

Vienna.

p. 467.

No. 1304.

STRAWBERRY ICE.

*Erdbeergefrornes.*

Mash strawberries and extract all the juice, mix it with sugar, and freeze it. In the same way raspberries, mulberries, etc. may be frozen.

1794. *Wienerisches bewahrtes Kochbuch.*

By Ignaz Gartler.

Edited &amp; Improved by Barbara Hikmann.

Vienna.

p. 467.

No. 1306.

[VANILLA ICE.]

*Faniliegefrornes.*

Cook some vanilla in Cream and let it cool, add sugar to taste, and freeze.

1794. *Wienerisches bewahrtes Kochbuch.*

By Ignaz Gartler.

Edited and Improved by Barbara Hikmann.

Vienna.

p. 470.

No. 1314.

[LEMON ICE.]

*Limonegefrornes.*

Rub 12 lemons on  $\frac{1}{4}$  pound of loaf sugar, and add to it the juice of them all, with two teacups of water, cook it and let cool, put it through a sieve and freeze.

1794. *Wienerisches bewahrtes Kochbuch.*

Ignaz Gartler.

Edited &amp; Improved by Barbara Hikmann.

Vienna.

p. 472.

No. 1322.

[PEACH ICE.]

*Pfirsichgefrornes.*

Peel and mash through a colander good ripe peaches, and for a pound of pulp add  $\frac{1}{2}$  pound of sugar and 2 cups of Rhine wine, the grated rind of one lemon and the juice of three, mix with a cupful of boiling water and put it through a hair sieve, etc. . . .

1794. *Wienerisches bewahrtes Kochbuch.*

Ignaz Gartler.

Edited &amp; Improved by Barbara Hikmann.

Vienna.

p. 473.

No. 1324.

[PISTACHE ICE.]

*Pistazengefrornes.*

Put a pint of cream in an earthen dish and boil it, take  $\frac{1}{2}$  pound of pistache nuts pounded fine, mix them with sugar, one whole egg,

and the whites of 5 eggs, pour in the hot cream, mix and stir until it begins to thicken, cool and freeze.

1794. *Wienerisches Bewahrtes Kochbuch.*

Ignaz Gartler, Edited & Improved by Barbara Hikmann.

Vienna.

p. 473.

No. 1325.

[ORANGE ICE.]

*Pomeranzengefrornes.*

Grate 6 oranges and 4 lemons on 1 pound of loaf sugar add 2 tea-cups of Maderia wine and one cup of boiling water to the sugar, and proceed as with other ices.

1794. *Wienerisches Bewahrtes Kochbuch.*

Ignaz Gartler, Edited & Improved by Barbara Hikmann.

Vienna.

p. 475.

No. 1331.

[CHERRY ICE.]

*Wechselgefrornes.*

Take Spanish or ordinary cherries remove the pits, let them stand over night to bring out the flavor [probably means in water, does not say so], then strain through a cloth sweeten to taste and freeze.

1794. *Wienerisches Bewahrtes Kochbuch.*

Ignaz Gartler, Edited & Improved by Barbara Hikmann.

Vienna.

p. 467.

[QUINCE ICE.]

Cook the quinces in water, let them drain and mash them; to 1 pound of this marmalade take  $\frac{3}{4}$  pound of sifted sugar, 2 wine glasses of Malaga wine, the yellow rind of a lemon and the juice of two, strain this once and freeze as other ices.



1794. *Wienerisches Bewahrtes Kochbuch.*

Ignaz Gartler, Edited &amp; Improved by Barbara Hikmann.

Vienna.

p.472.

## [CREAM ICE.]

No. 1321.

(Literally "thick milk Ice".)

*Papinegefrornes.*

Boil 1 pint of cream and when it is cold, mix it with the yolks of 9 eggs well beaten, the rind of a lemon rubbed on sugar, a stick of whole Cinnamon, a quarter of a pound of sugar, cook all together till it begins to thicken, then put it through a hair sieve, and freeze. When half frozen a drop of oil of bergamot may be added.

1805. *Almanach des Gourmands.*

Paris.

Vol. 2, p. 227.

## DU FROMAGE, ETC.

This subject would be incomplete if we said nothing about *Fromages glacés*, although it is a mistake to give this name to all kinds of ices prepared in moulds. We speak of Strawberry *Fromage glacé*, or Apricot, or Gooseberry, although they contain not a drop of cream. That is one of the idiosyncrasies of our language.

Whatever they are made of these *Fromage glacés* in forms are the prettiest of desserts.

2. ENGLISH QUOTATIONS ILLUSTRATING THE MEANING OF THE TERM  
*Ice Cream.*1769. *The Experienced English Housekeeper.*

Elizabeth Raffald [1773].

London.

p. 233.

## TO MAKE ICE CREAM.

Pare, stone and scald twelve ripe apricots, beat them fine in a marble mortar, put to them 6 ounces of double refined sugar, a pint of scalding cream, work it through a hair sieve, put it into a tin that has a close cover, set it in a tub of ice broken small, and a large quantity of salt put amongst it. When the cream grows thick round the edges, stir it and set it in again till it grows quite thick. When your cream is all froze up take it out of your tin and put it in a mould . . . in another tub of ice and salt. . . .

1786. *The Complete Housekeeper and Professed Cook.*

Mary Smith.

Newcastle.

p. 299.

## ITALIAN ICE CREAM.

Boil 1 pint of cream with coriander seeds, a stick of cinnamon, a piece of lemon skin, for 10 minutes, sweeten with loaf sugar, strain, cool and freeze.

1786. *The Complete Housekeeper and Professed Cook.*

Mary Smith.

Newcastle.

p. 299.

## SHADDEROT CREAM.

Pare 2 lemons very thin and put into 1 pint of water, add the juice and let stand one hour. Strain and sweeten with clarified sugar, put to it a little essence of shadderot to give a fine flavor then put it in the ice-well. . . .

1786. *The Complete House-keeper & Professed Cook.*

Mary Smith.

Newcastle.

p. 299.

## BROWN BREAD ICE.

Take  $\frac{1}{2}$  pound of brown bread crumbs, put them into  $1\frac{1}{2}$  pints of good thick cream, sweeten to your taste with clarified sugar, put it into an ice-well, . . . &c. Biscuit ice may be made the same way.

1786. *The Complete House-keeper & Professed Cook.*

Mary Smith.

Newcastle.

p. 298.

## RASPBERRY ICE CREAM.

Mix  $\frac{1}{2}$  pound of raspberry jam in 1 pint of thick cream, add to it  $\frac{1}{2}$  teaspoonful of prepared cochineal to colour, strain it through a sieve to take out the seeds and put it in a tin or lead mould that will hold 2 quarts, which is generally called an ice-well, and put in a pail of broken ice, . . .

1786. Mary Smith, *The Complete Housekeeper*, New Edition, pp. 301 ff.

*Orange ice cream.* Squeeze the juice of three Seville oranges into a bowl with a pint of water, the rind of one orange, and as much sugar as will sweeten it; let it stand for two hours, strain it, put it into an ice-well, and freeze it; then put it into leaden orange moulds, lap them up in paper, and put them into a pail with ice and salt under and over them, and let them stand two hours or more; dip them in water, turn them out upon a plate, and garnish them with green leaves.

*Peach ice cream.* Put half a pound of peach jam into a pint of water, add to it the juice of two lemons, mix it well, and strain it through a sieve; if it is not sweet enough add to it a little clarified sugar; put it into an ice-well, and freeze it pretty stiff; then put it into peach moulds, lap them up in paper, put them into a pail with ice and salt under and over them, and let them lie two hours to stiffen. When you want to use them, dip them in cold water, turn them out on a plate, colour them with a little prepared cochineal, and garnish them with green leaves.

*Ice cream of apricots.* Pare and stone fourteen apricots, put them into a preserving-pan with three-quarters of a pound of loaf-sugar, and a pint and half of water; set it over the stove to boil for twenty minutes; when they are boiling, bruise them with a spoon, take them out, and rub them through a hair sieve into a bowl:—when the apricots are cold, put to them one pint of cream, mix it well together, put it into the ice-well, and freeze it pretty stiff; then put it into apricot moulds, lap them in paper, and put them in a pail with some ice and salt under and over them; then let them lie two or three hours to freeze. When you want them, dip them in cold water, turn them out on plates, colour them with cochineal to look like apricots, and garnish them with green leaves.

*Ice cream another way:* Squeeze the juice of eight sweet oranges into a bowl, add to it half a pint of water, and as much sugar as will sweeten it; strain it through a sieve, put it into an ice-well, and freeze it till it is stiff; put it into a lead pine-apple mould, lap it well up in paper, put it into a pail of ice, and salt under and over it, and let it stand for three hours. When you want it, dip your pine-apple in cold water, turn it out on a plate, green the leaves of the pine-apple with spinach juice, and garnish it with green leaves. You may put this cream into melon and pear moulds. If a melon, you must green it with spinach juice;—if a pear mould, you must streak it with red.

1791. *The Practice of Cookery, Pastry, Pickling, Preserving, &c.*

Mrs. Frazer.

Edinburg & London.

p. 133.

ICE CREAMS.

Apricot Ice.

Pare and stone a dozen and a half of ripe apricots; cut them in small pieces and throw them in a sieve; squeeze them very well with a spoon and add three-quarters of a pound of clarified sugar: take the kernels out of the shells and pound them fine in a mortar, moistening them with water; then mix this with your apricots and if the mixture is too thick thin it with the juice of 2 or 3 lemons and a little more water; then put it in your jelling-pot, etc., etc. [directions about freezing]. You may do peaches the same way.

Strawberry Cream Ice.

Take a pound of preserved strawberries; squeeze them through a sieve; boil a chopin [pint] of cream with a piece of sugar; mix this among your strawberries and pass the whole through your searce again; then ice it as before. All preserved fruits may be done the same way.

p. 134.

Pine Apple Ice.

Take what number of them you may have occasion for and pare them; cut them small and beat them in a mortar; squeeze them through a cloth; pound and squeeze them till you have got the whole of them through; add to it the juice of 4 lemons, and clarified sugar boiled to a pearly height. If it is too thick add some water, and put the whole through a fine searce. Ice it as before.

1792. *The London Art of Cookery.*

John Farley.

London.

p. 337.

ICE CREAM.

Take 12 ripe apricots, pare stone and scald them, and beat them fine in a marble mortar. Put to them 6 ounces of double refined sugar, a pint of scalding cream, and work it through a hair sieve. Put it into a tin that has a close cover, and set it in a tub of ice broken small, and a large quantity of salt put among it. Etc.

1796. *The Art of Cookery.*

Mrs. [Hannah] Glasse.

London.

p. 323.

To Make ICE CREAM.

Pare and stone 12 apricots and scald them, beat them fine in a mortar, add to them 6 ounces of double refined sugar and a pint of scalding cream and work it through a sieve. [Directions for freezing follow.] You may do any sort of fruit the same way.

[Conjectural date 1818, in N. Y.

Library, but probably earlier.]

1818? *New London Family Cook.*

Duncan Macdonald.

London.

p. 348.

BARBERRY ICE CREAM.

Put a spoonful of barberry jam into a basin with 1 pint of cream; squeeze in the juice of 1 lemon; add cochineal to color it; put it into a freezing-pot and cover it, and set in a pail of ice, . . .

Apricot, raspberry, strawberry and most other fruits may be iced in the same way.

BARBERRY WATER ICE.

Put a spoonful of barberry jam into a basin; squeeze in one lemon add a pint of water and a little cochineal to color it; pass it through a sieve and freeze it. Be careful that it freezes thick and smooth like butter before you put it in your moulds.

RASPBERRY AND STRAWBERRY WATER ICE.

The same way.

PINEAPPLE WATER ICE.

Take 2 gills of pineapple syrup, squeeze in the juice of 2 lemons and add a pint of water.

CHINA ORANGE WATER ICE.

Rasp 1 China orange, squeeze in the juice of 3, and 1 lemon, add 2 gills of syrup and  $\frac{1}{2}$  pint of water. Strain and freeze it thick and rich.

1900. *Boston Cook Book.*

Mary J. Lincoln.

p. 862 ff.

ICE-CREAM, No. 1 (Philadelphia Ice-Cream).

2 quarts cream; if thick, add 1 pint milk.

2 cups sugar.

2 tablespoonfuls vanilla.

This is the simplest, and to many the most delicious, form of ice-cream. Scald the cream; melt the sugar in it, and flavor when cool. Freeze as directed above. The cream should be very sweet and highly flavored, as both sweetness and flavor are lessened by freezing. To make it lighter and more delicate, whip the cream until you have a quart of froth, and add the froth after the cream is partly frozen. Many prefer to add the whites of eggs, beaten till foamy, but not stiff. Use two, three, or four eggs to each quart of cream. The proportion of sugar should vary according to the flavoring used.

#### ICE-CREAM, No. 2 (Neapolitan Ice-Cream).

1 quart milk.  
(6 or 8 eggs yolks.)  
1 cup sugar.  
1 pint to 1 quart cream.  
Sugar to taste.  
Flavoring.

Make a boiled custard with the milk, sugar, and the yolks of the eggs. Cook it slightly till smooth, but not curdled. Strain, and when cool add the cream, sugar to make it sweet, and any flavoring desired. The custard, when made with cream instead of milk, makes the richest kind of ice-cream. If cream cannot be obtained, beat the whites of the eggs till foamy, and add them just before freezing. No matter how many eggs are used, a little cream, if not more than half a cupful, is a decided improvement to all ice-creams. It is better to make sherbert, or fruit and water ices, than an inferior quality of ice-cream with milk.

#### ICE-CREAM, No. 3 (Miss Parloa).

1 pint milk.  
1 cup sugar.  
2 tablespoonfuls flour.  
1 saltspoonful salt.  
2 eggs.  
1 pint to 1 quart cream.  
 $\frac{1}{2}$  to 1 cup sugar.  
1 tablesp. flavoring extract.

Boil the milk. Mix the sugar, flour and salt; add the whole eggs, and beat all together. Add the boiling milk, and when well mixed turn into the double boiler, and cook twenty minutes, stirring constantly till smooth; after that, occasionally. When cool, add the cream, flavoring, and sugar to make it quite sweet. This makes a smooth and delicious cream; and if the milk be boiling and the custard cook fully twenty minutes, there will be no taste of the flour.

[Mrs. Lincoln follows the above staple recipes with a number of variants based upon them, different in flavoring, additional ingredients such as nuts, cake or bread crumbs, etc., and in mode of serving.]



1910. *Manual for Army Cooks.*

Prepared under the Direction of the Commissary-General, U. S.  
Army.

U. S. War Department, Document No. 379, Office of the Commissary-  
General.

p. 117.

## [Recipe] 407. ICE CREAM (1 gallon).

Ingredients used:

2½ quarts water.

3 ounces flour.

1½ pounds sugar.

10 eggs.

¼ ounce extract.

2 12-ounce cans evaporated milk.

Boil 2 quarts of water and add a batter made of the flour and 1 pint of water; then allow to come to a boil again, remove from the range, and add the sugar, eggs, a pinch of salt, flavoring extract, evaporated milk, and sufficient water to make 1 gallon. Whip well, and allow to cool before putting in the freezer. One gallon is sufficient for 20 men.

## [Recipe] 408. ICE CREAM (chocolate).

Ingredients used:

3 ounces chocolate grated.

1½ quarts water.

3 ounces flour.

1½ pounds sugar.

2 12-ounce cans evaporated milk.

10 eggs.

Put the grated chocolate in two quarts of water on the range and let come to a boil; add a batter made of the flour and a pint of water; let come to a boil again and remove from the range. Add the eggs and sugar; whip well and add the milk, together with sufficient water to make 1 gallon; allow to cool before putting in the freezer. Sufficient for about 20 men.

## [Recipe] 409. ICE CREAM, Coffee (1 gallon).

Ingredients used:

6 ounces coffee.

1½ pounds sugar.

4 to 10 eggs.

2 12-ounce cans evaporated milk.

3 ounces flour.

Add the coffee to 1 quart of boiling water; then remove from the range, cover well, and allow to stand until cool. Place a quart of water on the range, make a batter, using the flour and 1 pint of water, adding the batter to the quart of water on the range when the latter has reached the boiling point. Let come to a boil, remove from the range, and strain the coffee into the mixture through a clean cloth. Add the eggs, sugar and cream. Whip well and add sufficient water to make 1 gallon. Freeze as ordinary ice cream. Sufficient for about 20 men.



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**IN THE  
SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1916.

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NO. 40.

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THE HUTCHINSON ICE CREAM CO.

AND C. J. HUTCHINSON, MANAGER,

*Plaintiffs in Error.*

VS.

THE STATE OF IOWA.

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BRIEF FOR DEFENDANT IN ERROR.

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STATEMENT.

As the record is made up and as the case has been presented in argument by the plaintiff in error, there is but one question to consider, namely: is that part of the pure food law of the statutes of Iowa which fixes the standard for ice cream unconstitutional, in that it offends against the due process clause and the equal protection clause of the Fourteenth Amendment to the federal constitution.

Since the argument of plaintiff in error assumes that the standard for regular or natural ice cream is the same as fruit or nut ice cream, it will be well to set out the statutes of the state covering the question.

Section 4999-a20, Supplement to the Code, 1913, provides in part:

"No person, firm or corporation, by himself, officer, servant or agent, or as the officer, servant, or agent of any other person, firm or corporation, shall manufacture or introduce into the state, or solicit or take orders for delivery, or sell, exchange, deliver or have in his possession with the intent to sell, exchange or expose or offer for sale or exchange, any article of food which is adulterated or misbranded, within the meaning of this act."

Section 4999-a31c provides in part:

"The word 'food,' as herein used, shall include all articles used for food, drink, confectionery or condiment, by man or domestic animals, whether simple, mixed or compound."

Section 4999-a31e, Supplement to the Code provides in part:

"For the purpose of this act an article of food shall be deemed to be adulterated:

"First. If any substance or substances has or have been mixed and packed with it so as to reduce or lower or injuriously affect its quality, strength or purity.

"Second. If any substance or substances has or have been substituted wholly or in part for the article.

"Third. If any valuable constituent of the article has been wholly or in part abstracted.

"Fourth. If it be an imitation of, or offered for sale, under the specific name of another article, or if it does not conform to the standards established by law."

The act then specifies the standard of some twenty-five or thirty food products, some being manufactured, some natural products, and then follows the particular standard fixed for ice cream which reads as follows:

**"ICE CREAM."**

"1. Ice cream is the frozen product made from pure wholesome sweet cream, and sugar, with or without flavoring, and if desired, the addition of not to exceed one per cent (1%) by weight of a harmless thickener, and contains not less than twelve per cent (12%) by weight of milk fat, and the acidity shall not exceed three tenths (3-10) of one per cent (1%).

"2. Fruit ice cream is the frozen product made from pure wholesome sweet cream, sugar, and sound, clean, mature fruits, and, if desired, the addition of not to exceed one per cent (1%) by weight of a harmless thickener, and contains not less than ten per cent (10%) by weight of milk fat.

"3. Nut ice cream is the frozen product made from pure wholesome, sweet cream, sugar, and sound, non-rancid nuts, and, if desired, the addition of not to exceed one per cent (1%) by weight of a harmless thickener, and contains not less than ten per cent (10%) by weight of milk fat."



See Section 4999-a31-c, a31-e, Supplement to the Code, 1913, and section 4999-a31; a31-c; a31-e, Supplemental Supplement, 1915.

### **The Point in Controversy.**

Reduced to its last analysis, the question under consideration is whether or not the state of Iowa can fix some standard, or, if you please, any standard of the amount of butter fat or cream the product must contain.

This is true, because the argument of plaintiff in error does not proceed upon the theory that the particular standard fixed is so arbitrary and unreasonable as to be unconstitutional, but rather does the argument proceed upon the theory that the state has no right to fix any standard whatever.

The state will not follow the method of argument as out-lined by plaintiff in error and treat separately the points of argument consisting of six separate propositions, for the reason that the state does not care to controvert the abstract legal propositions enunciated by counsel. They are perfectly elementary and perfectly understood by every constitutional lawyer. The point in controversy narrows down to the application of legal principles and precedents.

The decision of the supreme court of Iowa sustaining the constitutionality of the act is found in 168 Iowa, 1. See Appendix in the Brief, page.....

### ARGUMENT.

The act having been passed for the purpose of preventing fraud in the sale of a food product, namely: ice cream, it is clearly within the police power of the state, and hence does not deprive plaintiff of his property without due process of law or deny to him the equal protection of the laws under the Fourteenth Amendment.

There is nothing better established in the whole realm of jurisprudence than that the state has plenary power to protect its people from either fraud or unwholesomeness in the sale of food products.

We cannot do better than open this argument by reference to and a quotation from the very well considered case of *Plumley vs. Massachusetts*, 155 U. S., 461, in which it was clearly admitted that oleomargarine was a wholesome food product and an article of commerce, and subject to the protection of the commerce clause and the Fourteenth Amendment; but that a state law of Massachusetts prohibiting its sale if it was artificially colored so as to cause it to look like yellow butter did not offend against the federal constitution.

We think that the application of the principles announced in that case conclusive of the propositions involved in the present controversy. Mr. Justice Harlan who wrote the opinion very aptly said on page 472:

“If there be any subject over which it would seem the states ought to have plenary control, and the power to legislate in respect to which it ought not to be supposed was intended to be surrendered to

(Italics are ours.)



the general government, it is the protection of the people against fraud and deception in the sale of food products. Such legislation may, indeed, indirectly or incidentally affect trade in such products transported from one state to another state. But that circumstance does not show that laws of the character alluded to are inconsistent with the power of congress to regulate commerce among the states."

Indeed, that case was much stronger than the present case, for the reason that it involved interstate commerce, whereas in the present case, the question of interstate commerce is not even remotely affected. This case arises from the sale of ice cream manufactured and sold in the state of Iowa.

Let it be remembered that the oleomargarine case did not involve the question of mislabeling so as to deceive the public. The oleomargarine in question was correctly and legibly labeled oleomargarine, but notwithstanding it was correctly labeled, it was found by the legislature of Massachusetts as a matter of experience that if the product was colored in imitation of butter, many persons would be deceived thereby.

The court on page 468 said:

"The statute seeks to suppress false pretenses and to promote fair dealing in the sale of an article of food. It compels the sale of oleomargarine for what it really is, by preventing its sale for what it is not. *Can it be that the constitution of the United States secures to any one the privilege of manufacturing and selling an article of food in such manner as to induce the mass of people to believe that they*

— 3 —

*are buying something which, in fact, is wholly different from that which is offered for sale? The constitution of the United States does not secure to any one the privilege of defrauding the public."*

The statutes in the oleomargarine cases cited by counsel, *Collins vs. New Hampshire*, 171 U. S. 30, and *Schollenberger vs. Pennsylvania*, 171 U. S., 1 were held unconstitutional because they prohibited the sale of oleomargarine at all, but as pointed out by our supreme court, in referring to the ice cream, "They (the manufacturers) may sell it for what it really is" and that "Possibly it would sell as readily if it is named and sold as frozen skim milk; if not this would be an additional argument for prohibiting the sale of so-called ice cream made from evaporated skim milk as ice cream."

*State vs. Hutchinson*, 168 Iowa 1.

Another case which we think is controlling in the case at bar is *Schmidinger vs. City of Chicago*, 226 U. S., 578. Counsel undertake to explain this case, but their explanation is unsatisfactory. In the *Schmidinger* case, this court sustained the validity of an ordinance of the city of Chicago which prohibited the sale of bread as bread, a perfectly wholesome article and an article for which there was a demand, and sustained the validity of the ordinance of Chicago which prescribed that loaves of bread could not be sold except they were of a particular size. There could be no possible excuse for this ordinance except to protect the people against fraud. It was frankly admitted that the ordinance in question would work a great inconvenience, and especially due to

evaporation after a loaf of bread was baked; that it would necessitate the use of an extra amount of material to cover this evaporation. In response to this, the court said:

“But inconveniences of this kind do not vitiate the exercise of legislative power. The local legislature is presumed to know what will be of the most benefit to the whole body of citizens.” Page 588.

And that:

“This court has had frequent occasion to declare that there is no absolute freedom of contract. The exercise of the police power fixing weights and measures and standard sizes must necessarily limit the freedom of contract which would otherwise exist. Such limitations are constantly imposed upon the right to contract freely, because of restrictions upon that right deemed necessary in the interest of the general welfare.” Pages 589-590.

And cited with approval the case of *Chicago, Burlington & Quincy Railroad Co. vs. McGuire*, 219 U. S., 549, and the cases therein reviewed.

This court held in the case of *Waters-Pierce Oil Co. vs. Deselms*, 212 U. S., 173, that a standard might be fixed which would result in prohibiting the sale of an article not of that particular standard. When it was urged that oils from other localities which were perfectly safe, although they have a specific gravity different from that prescribed by the statute of Oklahoma, and that such oils would be excluded by the standard in question, the now Chief Justice, in writing the opinion in response to this argument, said:

“But we think the court below was clearly right in deciding that, as the subject was within the police power of the state, it was not within the province of the judiciary to disregard the statute and treat it as void upon the theory that the legislature had acted unwisely in fixing the standard which the statute prescribed.”

The decisions of this court are in exact harmony with the decisions of a number of state courts touching the matter under consideration.

The supreme court of Iowa in the case of *State vs. Snow*, 81 Iowa, 642, sustained the constitutionality of an act of the legislature which prohibited the sale of any article intended for use as lard which contained any ingredient but the pure fat of healthy swine, unless it be labeled as “compound lard.” An excerpt from the court’s decision is pertinent to the case at bar. The court on page 646 said:

“If a dealer offers for sale an article intended to be used for lard, he must label it so that the public may not be deceived or defrauded by paying the value of pure lard for a cheaper article. If the dealer will label the article so that the public may know what they purchase, he may deal in it with impunity. This much the law-making power may demand of him without impairing any right of property, or the exercise of any lawful business.”

And our state court, following that decision, has held in substance that if a dealer offers a product as ice cream, it must actually contain a substantial amount of cream or milk fat, or else it must be so labeled and described

that the public may not be deceived or defrauded by paying the value of real ice cream and obtaining a cheaper article, but that if the dealer will label the article so that the public may know what they purchase, he may deal in it with impunity.

The supreme court of Iowa in the case of *State vs. Schlenker*, 112 Iowa, 642, sustained the constitutionality of our pure food law in relation to the sale of milk, and it was therein held that "It is not enough to say that defendant did not intend to defraud, or that the milk he sold was wholesome. \* \* \* It is enough that adulteration such as prescribed by the statute *may* defraud or prove deleterious to the public health or comfort."

In the case of *State vs. Crescent Creamery Company*, 54 L. R. A. 466, the supreme court of Minnesota sustained the validity of a statute requiring cream to contain 20% of fat, and this, although there was no adulteration of the article; in other words, if the cream contained less than twenty per cent of fat, it could not be sold as cream. The reasoning of the court in that case is in exact harmony with the reasoning of the supreme court of Iowa in sustaining the validity of the statute now in question. The statute of Minnesota read:

"No person shall sell, or offer for sale, any cream taken from impure or diseased milk, or *cream that contains less than twenty per cent of fat.*"

Precisely the same objection to the statute and the same line of argument was made as is now being made in the case at bar, but the court held that the statute was a



part of the general statutes of the state enacted to prevent deception in the sale of dairy products, and its obvious purpose is to fix a standard for cream, *and forbids the sale of any cream, as such, which is below the prescribed standard*; in other words, the court held that cream could not be sold *as cream* unless it contained twenty per cent of fat. In reply to the argument of counsel that it was commonly known that there was no practice of adulterating cream as there was in the case of milk, nor of simulating it as in the case of butter, and that pure cream is wholesome, though it contains less than twenty per cent of fat, the court said:

“Undoubtedly there is less necessity for a statute to prevent deception in the sale of cream than there is of one to prevent fraud in the sale of milk, because the latter may be classed as a necessity, and the former as a luxury, and its sale not as general as that of milk.”

But said the court:

“The distinction is one of degree, not of principle. In either case the legislature is the sole judge of the necessity and propriety of preventing deception in the sale of the article, by appropriate legislation.”

And citing the case of *Powell vs. Pennsylvania*, 127 U. S. 678.

The supreme court of New Hampshire in the case of *State vs. Campbell*, 64 N. H., 402, sustained the constitutionality of an act of the legislature which prescribed the

per cent of milk solids and the per cent of watery fluid which all milk must contain and sustained the decision of the lower court in holding that:

“Evidence that pure milk frequently does not come up to the standard fixed by the legislature is not admissible for the defendant, on the trial of an indictment under the statute for selling adulterated milk.”

To the same effect see the case of *State vs. Smyth*, 14 R. I., 100, in which it is held:

“It is equally a fraud on the buyer, whether the milk which he buys was originally good and has been deteriorated by the addition of water, or whether in its natural state it is so poor that it contains the same proportion of water as that which has been adulterated.”

To the same effect see the case of *Board of Health of New Jersey vs. Vandruens*, 72 Atl. 125.

In the case of *People vs. Bowen*, 182 N. Y., 1, the court made an observation especially applicable to the case under consideration. It was there said that the court had not gone so far as to prohibit the sale of milk that was wholesome even if up to the standard, “provided it is sold for what it actually is and not as pure milk.” But the court added:

“If offered for sale as milk simply, the presumption is that it is offered as pure milk, and when so offered, without making it known in any way that it is not pure, the legislature may inflict a penalty and make the same a crime, unless the milk has such positive and negative qualities as in its judgment pure milk should have.”



Counsel labor extensively to show that a man has no right to expect any particular thing when he calls for ice cream and pays for it. Counsel become quite scholastic in their endeavor to show that he might obtain frozen custard, frozen skim milk, or a variety of things.

Under Point 3, page 16, of their brief it is claimed that ice cream is a generic term, embracing a large number and variety of products; that it is not an imitation or a substitute.

Under Point 4, it is claimed that the act as construed by the supreme court of the state of Iowa is a prohibition of the sale of an admittedly wholesome article of food under its own name, and that it enacts an arbitrary standard.

We see no reason to enter into a learned discussion as to "What is ice cream?" Every legitimate argument made by counsel has been disposed of in the cases decided by this court or state courts of respectability.

These courts have held that cream may not be sold as cream and milk may not be sold as milk even though absolutely free from adulteration, even though it is concededly wholesome and sanitary, unless the cream has a given content of butter fat and the milk has a given content of milk fat.

This court has sustained the constitutionality of a city ordinance and a state law holding that bread may not be sold as bread even though entirely wholesome, unless sold in accordance with a certain standard; and this

court has sustained the validity of a state law that oleomargarine may not be sold as oleomargarine if it happens to be so artificially colored as to look like butter, notwithstanding it is labeled oleomargarine.

The point decided by these decisions is not whether a thing is sold in its own name, or is an imitation, or whether it is wholesome. It is sufficient to satisfy all constitutional requirements that the statute in question tends to prevent fraud. The purchaser cannot possibly tell what he is purchasing by merely looking at the article, and in the days of the telephone and delivery service, in most instances he does not see the article until after it is delivered. There is wonderful opportunity for fraud in the case of the manufacture and sale of ice cream.

It will not do for counsel to refer to the formula as set out in the decision of our supreme court as an absolute fake. We admit that it is a fake, and what we seek to do by the Iowa statute is to prevent the use of just such fakes or frauds as this. Destructive competition and the love of gain furnish the inducement to engage in all sorts of fraudulent practices.

How is the honest manufacturer going to compete with the manufacturer of ice cream who uses powdered milk, condensed milk and what is still worse, by the use of the homogenizer he may use stale butter, stale butterine or oleomargarine.

About the time these cases were argued in the court below in the state of Iowa, there appeared in the Chica-

go Record-Herald an article quoting extensively from Dr. George B. Young, then commissioner of Chicago, in which he called attention to the fact that by the use of this rather modern invention known as the homogenizer, a product resembling cream may be made from butter, new or old, butterine, oleomargarine, and the Doctor stated in this article that ice cream was being made from this artificial cream and sold to the restaurants in Chicago and by them to their patrons as real ice cream.

By the use of the homogenizer animal fats may be used as a substitute for cream, and it is well known that saccharine may be used as a substitute for sugar.

Without again setting out the formulas as given in the Forecast of the January issue of 1914, I direct the attention of this court to these formulas copied in the decision of our own court. See the Appendix, pages 38-39. See also *State vs. Hutchinson*, 168 Iowa, 15, 16.

I also call the court's attention to the formula which was used by Prof. Crowley then connected with the Dairy and Food Department of the state of Iowa, formerly a professor in the State Agricultural College of Iowa at Ames, and now occupying the same position with the State Agricultural College of Iowa. This formula was used in manufacturing ice cream for the purpose of an exhibit to the supreme court of Iowa when the case was submitted to that court. Appendix, pages 25-26.

We also include in the Appendix, pages 27-28, a few formulas as given by Prof. Baer of the Agricultural Experi-

ment Station of the University of Wisconsin in the February, 1916, Bulletin, entitled "Ice Cream Making," and numbered Bulletin 262.

We quote from page 34 of the Bulletin: "The formulas given are for ten gallons of finished ice cream." This Bulletin by the Agricultural extension of the University of Wisconsin not only shows the possibilities of fraud, but the frequent use of the homogenizer and the use of condensed milk and powdered milk.

Iowa is not alone in recognizing the necessity of fixing a standard in the sale of ice cream in order to prevent fraud. In Colorado, Georgia, Idaho, Kansas, Kentucky, Missouri, Montana, Nebraska, New Hampshire, Nevada, North Carolina, North Dakota, Oklahoma, South Dakota, Utah, Wisconsin and Wyoming, the standard fixed for ice cream to be sold in each of those states must contain fourteen per cent of butter fat.

The states of California, Florida, Michigan, Minnesota and Oregon have fixed the standard for ice cream at twelve per cent butter fat the same as Iowa. But five states which have legislated have a lower standard than Iowa. See Bureau of Animal Industry, Circular No. 218.

Prof. Wiley when he was connected with the Department of Agriculture, fixed the standard of ice cream at fourteen per cent of butter fat. Circular 19, United States Department of Agriculture, page 7. It is true that he had no authority from Congress, and therefore there was no way by which the laws could be enforced.

This is the basis for the failure in the two federal decisions referred to by counsel for plaintiff in error, but it at least indicates what Dr. Wiley thought to be a reasonable per cent.

Twenty-nine states have fixed a higher standard in the sale of cream than in Iowa; four of these states, including the District of Columbia, fix the standard at twenty per cent. Twenty-five states fix the standard at eighteen per cent. Only two states fix a lower standard than that of Iowa. Circular 218, Bureau of Animal Industry.

Counsel have placed an unwarranted construction upon the case of *Rigbers vs. City of Atlanta*, 66 S. E. 991, in which the court of appeals of Georgia held invalid the ordinance of Atlanta, which in effect absolutely prohibited the sale of ice cream, unless it contained twelve per cent butter fat. The case however does not determine the scope of the police power of a state. It is authority only against the passage of a city ordinance in the absence of express authority so to do. The first statement made by Powell, Justice, was that "No express power has been granted to the city of Atlanta to pass the ordinance in question." And again the court said:

"It may be a serious question as to whether the provisions of the pure food law of this state are not broad enough to take away from municipalities the right to prescribe standards of foodstuffs."

And later on the court conceded the principle contended for by the state in this case, in this language:



"Even if the city has the power to prescribe that no ice cream of less than a certain percentage of richness in butter fats shall be sold as standard ice cream, it still would not have the power to say that ice cream below that standard should not be sold at all. *For instance, it might be permissible to say that the term 'ice cream,' or 'standard ice cream,' or 'first class ice cream,' should relate only to ice cream of a certain prescribed richness, and that whoever sold ice cream of poorer quality should, either by calling it under some other name, or by indicating on the vessel in which it is delivered, or otherwise, disclose the inferiority of its quality.*"

And concluded the decision as follows:

"But to say that, in a city the size of Atlanta, no one shall under any circumstances, or for any purpose, sell any ice cream containing less than ten per cent butter fats is so unreasonable that the ordinance cannot be upheld, *where the city's power to pass it rests solely upon the general welfare clause of its charter.*"

It is impossible to follow counsel in their line of reasoning. It is too involved and complicated; it is ingenious but not persuasive or convincing.

It is not true as urged by counsel under Point 5 that no evil existed before the passage of the Iowa statute, or that the evil sought to be corrected was the evil created by the statute itself; in fact, if all that counsel say is true concerning the loose definition of ice cream, it is a very strong reason why such a statute should be passed. It was time that the different states of the

Union should fix some standard so that when a person bought ice cream, he would have some means of knowing what he would secure. Formerly we never knew what we bought when we called for maple syrup and paid for maple syrup, but now, thanks to the pure food laws, state and national, we know what we are buying.

When a man purchases ice cream, he may not have in mind any given butter fat content, but he has a reason to expect that he is not going to receive something which was made out of stale butter, butterine, oleomargarine, powdered milk, condensed milk, saccharine and copious proportions of water and gelatine. He has a right to expect that it will be made from wholesome sweet milk with a substantial per cent of cream, the exact standard, so long as it is not unreasonable, being entirely for the legislature. Hence, fraud did exist in the manufacture and the sale of ice cream prior to the passage of the statute. It was because of the fraud existing which induced the legislature to pass the statute.

As a matter of fact, today the legitimate manufacturer, who is manufacturing a good grade of ice cream, wants just such a statute as we have in order to protect himself against the manufacturer who is willing to resort to these unquestionable methods and use questionable ingredients in manufacturing ice cream.

Hence the legislature has said that if a product is to be sold as *ice cream*, it must contain not less than twelve per cent by weight of milk fat, but it leaves all sorts of combinations in the use of a harmless thickener or filler.



Counsel quote with approval from the opinion of Judge McHenry of the lower district court of Iowa, and present a line of argument that is indulged in by counsel generally in seeking to overthrow a statute, and claim that if the legislature can prescribe the standard in question, then a far different standard might be prescribed. The result of the argument amounts to this: that the statute must be stricken down as unconstitutional for the reason that if the court holds that the legislature may prescribe a *reasonable* standard, they will thereby be compelled to hold that the legislature may prescribe an *unreasonable* standard. No line of argument is more frequently indulged in which is possessed of less merit.

The answer to this argument is found by this court, speaking through Mr. Justice Hughes, in the case of *Price vs. Illinois*, 238 U. S. 446, wherein the court said:

“The legislature is entitled to estimate degrees of evil and to adjust its legislation according to the exigency found to exist.

And that when an “unconstitutional discrimination against the plaintiff in error” is claimed, “the question is whether the classification made by the legislature can be said to be without any reasonable basis.”

In the case of *Lawton vs. Steele*, 152 U. S. 133, this court held that in correcting evils, the legislature was entitled to “a large liberty of choice in the means employed,” and in this “liberty of choice” unless this prohibition is palpably unreasonable and arbitrary, “we

are not at liberty to say that it passes beyond the limits of the states protective authority."

In the case of *Heath & Milligan Co. vs. Worst*, 207 U. S. 338, it is said:

"A classification may not be merely arbitrary, but necessarily there must be great freedom of discretion, even though it result in 'ill-advised, unequal and oppressive legislation.' *Mobile Company vs. Kimball*, 102 U. S. 691. And this necessarily on account of the complex problems which are presented to government. Evils must be met as they arise and according to the manner in which they arise. The right remedy may not always be apparent. Any interference, indeed, may be asserted to be evil, may result in evil. At any rate, exact wisdom and nice adaptation of remedies are not required by the Fourteenth Amendment, nor the crudeness nor the impolicy nor even the injustice of state laws redressed by it."

The true rule is stated in the case of *German Alliance Insurance Co. vs. Kansas*, 233 U. S. 389, in which the court quotes with approval:

"The scope of judicial inquiry in deciding the question of *power* is not to be confused with the scope of legislative considerations in dealing with the matter of *policy*. Whether the enactment is wise or unwise, whether it is based on sound economic theory, whether it is the best means to achieve the desired result, whether, in short, the legislative discretion within its prescribed limits should be exercised in a particular manner, are matters for the judgment of the legislature, and the earnest con-

flict of serious opinion does not suffice to bring them within the range of judicial cognizance."

And in that case on page 411, the court says, referring to the cases cited:

"They demonstrate that a business, by circumstances and its nature, may rise from private to be of public concern and be subject, in consequence, to governmental regulation."

And quote with approval that:

"The underlying principle is that business of certain kinds holds such a peculiar relation to the public interests that there is superinduced upon it the right of public regulation."

And proceed to state that:

"It would be a bold thing to say that the principle is fixed, inelastic, in the precedents of the past and cannot be applied though modern economic conditions may make necessary or beneficial its application. In other words, to say that government possessed at one time a greater power to recognize the public interest in a business and its regulation to promote the general welfare than government possesses today."

On reason and on authority, the decision of the supreme court of Iowa should be affirmed.

Respectfully submitted,

GEORGE COSSON,  
*Attorney General of Iowa,*  
*Counsel for Defendant in error.*

## APPENDIX.

I, P. W. Crowley, on oath declare that I am a resident of Des Moines, Polk county, Iowa. That I am at present a member of the staff of the State Dairy and Food Commissioner as expert and instructor in ice cream work and that prior to taking up my present work, I occupied the position of instructor in ice cream making at the Iowa State College of Agriculture. That on Tuesday, April 7, 1914, I manufactured ice cream, using four different formulas as given herein and the cost of materials used in each formula is a true and reasonable cost for such materials and that the statement of cost per gallon for these materials and approximate percentage of butter fat in each case is correct to the best of my knowledge and belief.

### Formula I.

7.75 lbs. of 34% cream at 35c per lb. butter fat..	\$ .92
1.85 lbs. of milk at 6¼c per quart.....	.0577
2.6 lbs. of condensed milk at 60c per gallon....	.17
2.7 lbs. sugar at 5c per lb.....	.135
1.2 oz. vanilla at \$8.00 per gallon.....	.075

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Cost of three gallons.....\$1.357

Cost per gallon......452

Approximate percentage of butter fat, 20%.

### Formula II.

2.1 lbs. of 34% cream at 35c per lb. butter fat.\$	.25
7.8 lbs. of milk at 6¼c per quart.....	.24
2.25 lbs. sugar at 5c per lb.....	.1125

1.2 oz. gelatine at 35c per lb.....	.026
1.2 oz. vanilla at \$8.00 per gallon.....	.075
2.64 lbs. condensed milk at 60c per gallon.....	.175
<hr/>	
Cost of three gallons.....	\$ .8785
Cost per gallon.....	.2928
Approximate percentage of butter fat, 7.7%.	

#### Formula III.

2.1 lbs. condensed milk at 60c per gallon.....	\$ .1398
2 lbs. milk at 6 $\frac{1}{4}$ c per quart.....	.0625
6 lbs. water .....	.0000
1.38 lbs. sugar at 5c per lb.....	.069
1.2 oz. gelatine at 35c per lb.....	.026
1.5 oz. vanilla at \$8.00 per gallon.....	.093
<hr/>	
Cost of two and one-half gallons.....	\$ .389
Cost per gallon.....	.155
Approximate percentage of butter fat, 1.9%.	

#### Formula IV.

13.2 lbs. artificial cream 18%, 2.37 lbs. at 23.5c..	\$ .558
2.4 lbs. sugar at 5c per lb.....	.120
1.2 oz. vanilla at \$8.00 per gallon.....	.075
1.2 oz. gelatine at 35c per lb.....	.026
<hr/>	
Cost of three gallons.....	\$ .779
Cost per gallon.....	.259
Approximate percentage of butter fat, 15%.	

Had artificial cream composed of oleomargarine and milk been used in the various formulas instead of natural



sweet cream, the saving effected would have reduced the cost per gallon as follows: Formula No. I, ten cents; Formula No. II, three cents.

P. W. CROWLEY.

State of Iowa, Polk County, ss.

Subscribed and sworn to before me by said P. W. Crowley, this 9th day of April, A. D. 1914.

HARRY W. DAHL,

Notary Public.

### A FEW SIMPLE FORMULAS.

In the commercial manufacture of ice cream no definite formulas are followed. Although many combinations have been tested with good results, no attempt had been made at the Wisconsin Experiment Station to work out any ideal formula for ice cream. The formulas given are for 10 gallons of finished ice cream.

- I. 5½ gallons 18 per cent cream (pasteurized).  
8 pounds sugar.  
2 ounces gelatine.  
4 ounces vanilla extract.
- II. 4½ gallons 18 per cent cream (pasteurized).  
1 gallon condensed milk.  
8 pounds sugar.  
2 ounces ice cream powder.  
4 ounces vanilla extract.
- III. 5½ gallons homogenized 16.5 per cent cream.  
8 pounds sugar.  
2 ounces gelatine.  
4 ounces vanilla extract.

IV. 40 pounds 22 per cent cream (homogenized).

4 pounds condensed milk.

8 pounds sugar.

4 ounces vanilla extract.

V. 44 pounds 20 per cent cream.

8 pounds sugar.

2 ounces cream powder or  $\frac{1}{2}$  ounce gum tragacanth.

4 ounces vanilla extract.

Formula IV, which contains no filler, will make an excellent quality of ice cream which, provided it is well packed, will remain in good condition for a week.

All the above formulas may be modified to reduce or increase the fat content of the ice cream. The lower the fat content of the cream, the more filler must be added to produce a smooth ice cream.

The sugar, filler, and flavor added to the cream will increase its volume about 10 per cent and will usually reduce the fat content  $2\frac{1}{2}$  per cent. An 18 per cent cream used as a basis in making up a "mix" will produce an ice cream testing  $15\frac{1}{2}$  per cent.

Bulletin 262, February, 1916, Agricultural Experiment Station of the University of Wisconsin.



SUPREME COURT  
OF THE  
STATE OF IOWA.

AT

DES MOINES.

SEPTEMBER, 1914, AND JANUARY, 1915, TERMS.

STATE OF IOWA, *Appellant*,

v.

HUTCHINSON ICE CREAM COMPANY, ET AL., *Appellees*.

Preston, J. 2. The principal point in the case is whether the act in question, fixing a standard for ice cream, is within the police power of the state. The contention of defendants, as they state it, is substantially that the act is not within the police powers of the state, for that it in fact has no relation to the comfort, health and welfare of the public, and hence violates both the state and federal constitutions by interfering with the personal liberty and private property of the citizen, without due process of law; that it is arbitrary, unreasonable and an unwarranted interference with a lawful business, depriving manufacturers of ice cream of property rights of great value, and depriving both manufacturers of ice cream and the people of their liberty.

The contention of the state is, in substance, that the act is clearly within the police power of the state, and hence does not offend against the federal or state con-

stitution, unless it has no reasonable relation to the purposes which it is designed to effect. It is conceded by the state that, to be a valid exercise of such power, the act must have relation to the comfort, safety or welfare of the public; but that the welfare of the public involves or includes the right of the legislature to protect the public from fraud and deception; that the constitution does not secure to anyone the privilege of defrauding the public; that it is impossible for consumers of ice cream to determine by any ordinary diligence the ingredients of the product; and that, without a standard, opportunity is afforded unscrupulous manufacturers of ice cream to palm off upon the public a much cheaper and inferior article for a higher quality at the price of the better and more costly product.

There seems to be no serious controversy between counsel for either side in regard to many of the fundamental propositions of law involved, but they agree that the difficulty lies in their application. Defendants concede the validity of the police power in its fullest extent; admit that it is within the power of the legislature to enact laws for the purpose of preventing fraud in the sale of food products; that ordinarily the propriety of passing an act of this character is a question for the determination of the legislature; that there are many restraints to which every person is necessarily subject for the common good; and that laws enacted under the police power to promote such purpose may be sustained, although they interfere, to some extent, with the liberty of the citizen and the freedom of contract. On the other hand, it is conceded by the state

that such laws, to be valid, and within the police power, must not be arbitrary or capricious, but reasonable and have a reasonable relation to the object to be accomplished.

Such concessions render it unnecessary for us to discuss at length some of the points, or to review the many cases cited. It is said by counsel for appellees that the only debatable ground in the case is whether this statute comes within the police power as a measure tending to prevent the liability to fraud and deception; that this is the real question. The wisdom or expediency of such a measure is not for the determination of the court.

The presumptions are in favor of the exercise of the power in the enactment. We are to overthrow the act, if at all, only when it violates the constitution "clearly, palpably, plainly and in such manner as to leave no reasonable doubt." The question is whether there is any reasonable ground upon which the legislature, acting within its conceded powers, could pass such a law as that now in question. The courts have not attempted to accurately define the limit of the police power, nor is it advisable to do so, because of changing conditions. The power is broad, but subordinate to the constitution. The courts may and will interfere in a proper case where the legislature has clearly exceeded the constitutional limitations. It is not enough that the case is a doubtful one. Though we might be of the opinion that an 8 per cent or some other standard should have been established, still we ought not to interfere with the

standard fixed by the legislature, unless such standard is clearly arbitrary and unreasonable. We shall not take the space to give definitions of police power. The question is discussed at length in the following, among others, of our own cases: *McGuire v. Railway*, 131 Iowa, 340, 354; *State v. Schlenker*, 112 Iowa, 642; *State v. Packing Co.*, 124 Iowa, 323.

It is not claimed by either side, as we understand it, that the act in question is a health law. The claim of the state is that the purpose of the legislature was to prevent the perpetration of fraud upon the public. The public welfare embraces a variety of interests calling for public care and control. These are: "The primary social interests of safety, order and morals; economic interests; and non-material and political interests." Freund *Police Power*, Secs. 9, 15.

The claim here is that the act fixing a standard for ice cream deals with economic interests, the purpose being, as already stated, to prevent fraud. It was said in one of the milk cases, *State v. Schlenker*, 112 Iowa, 642: "It is not enough to show that defendant did not intend to defraud, or that the milk be sold was wholesome . . . It is enough that adulteration such as prescribed by the statute may defraud, or prove deleterious to the public health or comfort. The legislature may well determine that the adulteration of milk tends to facilitate vicious practices and that it ought to be prohibited."

Laws tending to prevent fraud and to require honest weights and measures in the transaction of business

have been frequently sustained in the courts. *McLean v. Arkansas*, 211 U. S., 539, 550.

The constitution does not secure to anyone the privilege of defrauding the public. *Plumley v. Mass.*, 155 U. S., 461, 479.

As bearing upon the question as to whether this statute, fixing a certain standard for ice cream, is so manifestly arbitrary and unreasonable as that the legislature was not justified, under the police power, in enacting it, and whether fraud might have been practiced upon the public in the sale of ice cream, we should here refer to conditions and some of the facts which we ought to presume were known to the legislature when the statute was enacted. We say this because some of the facts and conditions called to our attention existed and were of more or less notoriety at the time of the passage of this law. We are asked to consider these facts and conditions for the purpose of determining whether the act is so manifestly arbitrary and unreasonable as to require us to hold it invalid. If, under any possible state of facts, the act would be constitutional and valid, the court is bound to presume that such conditions existed; whether a state of facts existed which called for the enactment of this legislation was for the determination of the legislature. *McGuire v. Railway, supra*.

An authority is cited to the effect that when a question of fact is debated or debatable, and the extent to which a constitutional limitation goes is affected by the truth in respect to that fact, the court will take judicial cognizance of all matters of general knowledge, and will



consider expressions of opinion from other than judicial sources given by those qualified by their skill and experience to express such opinions. *Muller v. Oregon*, 208 U. S., 412.

Just how far we should go in regard to such matters, where, as in this case, the decision was on demurrer, we need not determine, for the reason that we are asked by both sides, without objection from either, to consider depositions taken for use, had the case been tried on the merits, reports, trade journals, cookbooks containing a great many formulas for making ice cream, circulars, and the like. These have been abstracted and certified. We shall not attempt to set out all these matters, but enough to illustrate in a general way the points made.

It appears that in seventeen states the standard fixed for ice cream to be sold is 14 per cent; five states have fixed the standard at 12 per cent butter fat, the same as our own; but five states which have legislated have a lower standard than Iowa. The federal government fixes the standard for ice cream at 14 per cent. It should be said as to the 14 per cent standard fixed by the federal government that it is not claimed that such standard has been fixed by law, but by the United States Department of Agriculture. But, even though not law, it would be a circumstance proper to be considered as the opinion of that department. The legislature would not be bound entirely by the conflicting opinion of any of the persons we shall refer to. From these documents, it appears that there is a difference of opinion as to the advisability of establishing a standard for ice cream, or if it is estab-

lished, the per cent of butter fat the product should contain. Some think a high standard of butter fat is injurious to health, especially for children and invalids; others object to high butter fat contents during the summer months, on account of the shortage in the supply. It is contended by some that ice cream should be made from cream, sugar and flavor solely. An article in a trade journal says:

"Commissioners have agitated a high butter fat standard and we have the significant controverting fact that nowhere is there a great ice cream business built up on a high butter fat formula. The ice cream manufacturers know what the public wants. It does not want an over rich product because it cannot eat enough of it."

The same article states:

"The moral support of the dairyman, the creamery men and the cheese manufacturer and the milk dealer in these matters will help greatly. They have only to remember that when the ice cream man cuts his butter fat content, he adds condensed and that one is about as valuable as the other, if anything condensed is more valuable because it allows the use of all the milk."

Large manufacturers of ice cream from different parts of the country gave testimony and gave their opinions from their standpoint. They state that they would not attempt to define ice cream, because it covers a large number of frozen substances; that there is an unlimited number of formulas; cream should be a part of the mix, the same as sugar or flavor. When condensed milk is



used, the purpose is to add solids, thereby giving the cream better body; the purpose of the cream is to add to the flavor and to add to the body; the largest dealers in the United States are not so-called high butter fat men; butter fat is not the best solid to provide body for ice cream; there are manufacturers who make a high butter fat ice cream and cater only to exclusive trade and get a long price for it. One witness says:

“Speaking in a commercial sense, I do not believe raising the standard to 12 per cent would materially affect the price of the ice cream. It would diminish the amount of other solids which would be put in it; the milk producer’s skim milk would go to waste. The use of condensed milk has very much increased during the last few years because of the increased demand for ice cream and the extensive use of milk solids in ice cream. Millions of gallons of skim milk used to be thrown away which is now converted into condensed milk and there is a ready market for it. My experience is that the public prefers 8 per cent ice cream to 12 per cent. The 8 per cent standard was arrived at in Illinois by a commission which investigated the matter and arrived at the standard at 8 per cent. I do not think there should be any standard at all.”

Other witnesses gave similar testimony. One manufacturer of many years’ experience says that years ago ice cream would test so low in butter fat that you would not know how to find it; that it was then made out of milk, eggs, and corn starch, but that later, “We enlarged the butter fat in it.” He says that the man who makes high butter fat ice cream will have to demand more

money for it; that normal butter fat ice cream runs from 6 per cent to 10 per cent; that the per cent of butter fat has no relation to its wholesomeness.

Defendants show that consumers would eat a less quantity of ice cream which is rich in butter fat. This would decrease the consumption by the public, and the output and profits of the manufacturers. This would not, perhaps, be a reason for fixing a standard, but may bear on the motive of those who oppose it and affect their claims as to whether the standard is unreasonable. As stated, there are many formulas for making ice cream. Here is one: "Vanilla Ice Cream Without Cream or Milk. One vanilla bean, 8 gills of syrup at 20 degrees, 18 egg yolks. (To be cooked and frozen.) Then work in a meringue made of 2 egg whites and  $\frac{1}{4}$  lb. of sugar."

It is shown that the cost to manufacture ice cream containing 20 per cent butter fat is 45 cents per gallon; containing 7.7 per cent, 29 cents; and that where condensed milk is used and the product contains 1.9 per cent butter fat, the cost is 15 cents per gallon.

We have set out these matters somewhat in detail for the purpose of showing that the consumer may be defrauded, and as showing the propriety or necessity for fixing a standard, or rather to show that the legislature might properly so determine. We quote at some length from one of the documents submitted:

"Ice cream is one of the delights of the food adulterator for ice cream is a mixture of various things in which each one more or less loses its identity. The adulterator is able therefore to inject all manner of

inferior and often dangerous cheapeners into his product and to compete successfully with the honest manufacturer who makes clean, wholesome ice cream.

"The honest ice cream maker today is working at a decided disadvantage when he is obliged to compete with the dishonest one, since the dishonest one need not label his product so that the ingredients will be shown to the consumer or even to the retailer. This fact was strikingly shown at a recent meeting of ice cream manufacturers in New York, at which one man present declared that it was impossible for a competitive ice cream maker to be honest. This man asserted, and with much reason, that there were three things that made manufacturers dishonest. These three things were the federal government and the state and municipal departments of health, all of which encourage the dishonest manufacturer at the expense of the honest one. As a basis for his argument this man presented three formulas for making commercial ice cream which speak for themselves. Here they are:

"Formula No. 1.

"Sells to retailer at \$1.25 per gallon.

11 quarts 40% of cream at 45c.....	\$ 4.95
5 quarts grade B milk at 6½c.....	.33
4 quarts condensed milk at 20c.....	.80
9 pounds sugar .....	.45
4 ounces extract .....	.40
	<hr/>
	\$ 6.93

"When expanded by freezing this quantity of ingredients produces forty quarts of ice cream, con-

taining 20% butter fat at a cost of less than 80c per gallon.

“Formula No. 2.

“Sells to retailer at 90c per gallon.

3 quarts 40% cream at 45c.....	\$ 1.35
13 quarts grade B milk at 6½c.....	.85
4 quarts condensed milk at 20c.....	.80
4 ounces gelatine at 24c per lb.....	.06
4 ounces extract .....	.40
7½ pounds sugar.....	.38
	<hr/>
	\$ 3.84

“These ingredients expanded by freezing yield forty quarts of ice cream containing 7½% butter fat at a cost of 38c a gallon.

“Formula No. 3.

10 gallons of condensed milk.....	\$ 8.00
10 gallons grade B milk.....	2.60
60 gallons plain water.....	0.00
4 pounds gelatine at 20c.....	.80
Color .....	.01
Flavor .....	1.00
60 pounds sugar at 5c.....	3.00
	<hr/>
	\$15.41

“These ingredients expanded by freezing yield 120 gallons of ‘ice cream’ at a cost of 13 cents a gallon.

“What the ice cream makers, and consumers as well, need is the creation of ice cream standards and

laws which would compel the manufacturers who make 'cheap' ice cream to correctly label their product. A law is needed in New York and other places which will state how much butter fat must be contained in ice cream before it can be called ice cream and which will prevent the use of gelatine reeking with millions of bacteria and of coal tar dyes, unless these ingredients are labeled.

"Ice cream is a commercially manufactured commodity, and as such should be adequately regulated by the health authorities, both for the benefit of the honest manufacturers and the innocent consumers."

Notwithstanding these conflicting opinions, it was a question for the legislature to say whether this legislation was called for. The legislature was not compelled to take the view of either those who favor or oppose a standard. Taking one view of it, conditions were such as to clearly sustain the action of the legislature. We are not entirely satisfied that this would not be so if conditions were as claimed by the defendants. We are not to say, and do not, of course, determine that these defendants, or the association appearing in argument, or any particular person is or has been guilty of any fraud or deception. The question is whether, without a standard, dishonest or unscrupulous manufacturers may do so. It is not practicable by any ordinary inspection for the purchaser to distinguish cheaper, low-grade ice cream from the better quality. Because of this, it is apparent from the matters which we have detailed that an opportunity is afforded for deception by selling an inferior quality of ice cream at the price of a better or more expensive grade. This was the case in the sale of oleomargarine. *State vs.*



*Packing Co.*, 124 Iowa, 323. In this respect, it differs from the case of *Frost vs. Chicago*, 178 Ill., 250, where it was held that a person who is ordinarily careful and intelligent could not be deceived by a netting covering for baskets of fruit. In such case, the purchaser could still see and know what he was buying.

The purpose of the act in question was to prevent just such deception and fraud as would be possible without a standard, and it seems to us it cannot be seriously claimed that the statute will not accomplish the end sought.

It is said by defendants that they are deprived of the right to sell their product if it contains a less per cent of butter fat than that prescribed by the statute and that the sale of such is entirely prohibited. This, we think, is an assumption not warranted. They may sell it for what it really is. Possibly it would sell as readily if it is named and sold as frozen skim milk; if not, this would be an additional argument for prohibiting the sale of so-called ice cream made from evaporated skim milk as ice cream.

The state contends that every point in this case is decided against the contentions of defendants in *State vs. Schlenker*, *supra*, and *State vs. Snow*, 81 Iowa, 642. They are very closely in point.

The only case called to our attention in which the question of fixing a standard for ice cream was decided is *Rigbers vs. City of Atlanta*, 66 S. E., 991. In that case, under an ordinance, the prohibition was not against

selling ice cream of less than the prescribed percentage, as ice cream, but against selling it at all. The provision of the ordinance is: "Ice cream sold or kept for sale must contain at least 10% butter fats, for fruit ice cream, and 12% for plain ice cream." Under this ordinance, ice cream could not be sold or kept for sale unless it contained the required per cent of butter fat. As already stated our statute does not prohibit the sale of such product. In the Georgia case, the court said: "It might be permissible to say that the term 'ice cream' \* \* \* should relate only to ice cream of a certain prescribed richness, and that whoever sold ice cream of poorer quality should either by calling it under some other name or by indicating on the vessel in which it is delivered, or otherwise, disclose the inferiority of its quality"—thus recognizing the distinction which we make between that ordinance and our statute, and holding that the sale of ice cream may be regulated by fixing a standard. Our statute fixes a standard for ice cream and prohibits the sale of anything else as ice cream, but the sale of a product formerly known as ice cream, but containing a lower per cent of fat than that prescribed by the statute, is not prohibited. It may be sold for what it is. It may be sold under some other name and the consumer will not be deceived, for he now knows that when he buys ice cream he is getting an article containing a certain per cent of butter fat, and that this may not be so if he buys something not as ice cream, but as something else.

Defendants say their case comes within the doctrine of *People vs. Marx*, 99 N. Y., 377. This must be on the erroneous assumption that the Iowa statute prohibits



absolutely the sale of their product if it contains less than the specified per cent of fat. The New York statute referred to in the *Marx Case* did prohibit the sale of oleomargarine, which was shown to be a wholesome article and not injurious, and the statute was held invalid. That statute was amended so as to regulate the sale and held valid in *People vs. Arensberg*, 105 N. Y., 123, 128, 11 N. E., 277. As amended, the statute was entitled: "An act to prevent deception in the sale of dairy products," etc. It prohibited: (1) the manufacture out of any animal fat, or animal or vegetable oils not produced from unadulterated milk, or cream from the same, of any product in imitation or semblance or designed to take the place of any natural butter produced from milk, etc.; (2) mixing, compounding with, or adding to milk, cream or butter, any acids or other deleterious substances, or animal fats, etc., with design or intent to produce any article in imitation or semblance of natural butter; (3) selling, or keeping, or offering for sale, any article manufactured in violation of the provisions of the section.

The defendant was convicted of selling the article manufactured in violation of the provisions of the act. The court said:

"Assuming, as is claimed, that butter made from animal fat or oil is as wholesome, nutritious and suitable for food as dairy butter; that it is composed of the same elements and is substantially the same article, except as regards its origin; and that it is cheaper; and that it would be a violation of the constitutional rights and liberties of the people to pro-

hibit them from manufacturing or dealing in it, for the mere purpose of protecting the producers of dairy butter against competition, yet it cannot be claimed that the producers of butter made from animal fats or oils have any constitutional right to resort to devices for the purpose of making their product resemble in appearance the more expensive article known as 'dairy butter,' or that it is beyond the power of the legislature to enact such laws as they may deem necessary, to prevent the simulated article being put upon the market in such a form and manner as to be calculated to deceive. If it possesses the merits which are claimed for it, and is innocuous, those making and dealing in it should be protected in the enjoyment of liberty in those respects; but they may legally be required to sell it for and as what it actually is, and upon its own merits, and are not entitled to the benefit of any additional market value which may be imparted to it by resorting to artificial means to make it resemble dairy butter in appearance. It may be butter, but it is not butter made from cream, and the difference in cost or market value, if no other, would make it a fraud to pass off one article for the other."

*In re Jacobs*, 98 N. Y., 98, is cited. In that case, the statute purported to be an act to improve the public health by prohibiting the manufacture of cigars in tenement houses. It was held that it was not a health law; that cigar making had no relation to the health of the public and that the act was not intended to protect the health of the occupants of the tenement. In that case it was held, and the proposition is not disputed by the state, that the constitutional guaranty that no person

shall be deprived of his property without due process of law may be violated without the physical taking of property for public or private use, and that any law which destroys it or its value, or takes away any of its essential attributes, deprives the owner of his property. *People vs. Biesecker*, 169 N. Y., 53, 61 N. E., 990, is also cited. It was there held that the statutes under consideration could not be justified as an exercise of power to prevent fraud or imposition on buyers and consumers.

We have referred to these New York cases more fully than necessary, perhaps, but, because of the claim made for the *Marx Case*, we have thought it proper to refer briefly to the others as well. The *Marx Case* is cited and distinguished in *State vs. Snow*, 81 Iowa, 642.

In *Schmidinger vs. Chicago*, 226 U. S., 578, 57 L. Ed., 364, it was held that a city ordinance, fixing the weight of the standard loaf of bread to be sold in the city, and prohibiting the making or selling of loaves not up to the weight of the standard loaf, is not such an unreasonable and arbitrary exercise of the police power as to render the ordinance void under the constitution, prohibiting the taking of property without due process. It was shown in that case that there was a considerable demand for loaves of different size, and that so fixing the size produced some inconvenience. The ordinance was sustained upon the theory that it tended to prevent fraud in the sale of bread. The court said:

“Furthermore, laws and ordinances of the character of the one here under consideration and tending to prevent frauds and requiring honest weights

and measures in the sale of articles of general consumption, have long been considered lawful exercise of the police power." And that: "This court has had frequent occasion to declare that there is no absolute freedom of contract. The exercise of the police power fixing weights and measures and standard sizes must necessarily limit the freedom of contract which would otherwise exist. Such limitations are constantly imposed upon the right to contract freely, because of restrictions upon that right deemed necessary in the interest of the general welfare." And that: "So long as such action has a reasonable relation to the exercise of the power belonging to the local legislative body and is not so arbitrary or capricious as to be a deprivation of due process of law, freedom of contract is not interfered with in a constitutional sense."

That the legislature of the states may, in the exercise of the police power, regulate a lawful business, see *Barrett vs. Indiana*, 229 U. S., 26, 57 L. Ed., 1050.

The following cases may be cited as bearing upon the proposition that the legislature, under its police power, may enact laws for the purpose of preventing fraud in the sale of food products: *State vs. Campbell*, 64 N. H., 402; *Board vs. Van Druens*, 72 Atl. (N. J.), 125; *People vs. Bowen*, 182 N. Y., 1; *Chicago vs. Bowman Dairy Co.*, 234 Ill., 294; *People vs. Worden Grocer Co.*, 118 Mich., 604; *State vs. Crescent Creamery Co.*, 54 L. R. A. (Minn.), 466.

All points raised by the demurrers have been noticed. We are of opinion that the statute is within the police power of the state and is not unreasonable; that it has

a reasonable relation to the object to be effected and does not offend against either the federal or state constitutions in any of the particulars mentioned. It follows that the court erred in sustaining the demurrers. Both cases are *reversed* and *remanded*.

The justices all concur.

**No. 275.**

**A. B. CROWL, PLAINTIFF IN ERROR.**

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THE COMMONWEALTH OF PENNSYLVANIA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF  
PENNSYLVANIA.

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1 In the Court of Quarter Sessions of Erie County, Pennsylvania.

No. 32, September Sessions, 1911.

COMMONWEALTH

vs.

A. B. CROWL and W. F. LEWIS.

*Copy Docket Entry.*

Indictment: Selling adulterated ice-cream.

G. M. Pelton, Prosecutor.

Defendants and C. L. Alexander each held in \$200.00.

Sept. 12", 1911.—A true bill.

Nov. 15, 1911.—Case called, Hon. E. A. Walling, P. J., on the bench; same day Jury called and empanelled.

Nov. 15", 1911.—Motion made by the Defendants to Quash Indictment. Motion granted; see Stenographer's notes. Per Curiam.

Indictment: Selling ice cream deficient in butter fat.

Nov. 15", 1911.—A true bill.

Nov. 15", 1911.—Demurrer to the Indictment filed by the defendants. Demurrer overruled. Per Curiam, W.

To which same day the defendants except and an exception is sealed. Emory A. Walling, P. J. (L. S.)

Nov. 15", 1911.—The defendants plead not guilty, same day Jury called, empanelled and sworn, viz: Alex H. Donnell, James J. Fitzgerald, Clyde Z. Smiley, W. Marsh, John F. Zimmerman, J. M. Dougherty, W. A. McCray, Smith Brennan, Geo. W. Kibler, James Wetsel, Albert Keller and Roger Withrow, who say Nov. 16", 1911, they find the defendant W. F. Lewis not guilty and the defendant A. B. Crowl guilty as indicted.

Nov. 20", 1911.—Upon motion of the defendant in arrest of judgment, Rule to show cause granted. Per Curiam, W.

Nov. 20, 1911.—Upon motion for a new trial, rule to show cause granted, Defendant to have 15 days in which to file his reasons for the same. Per Curiam, W.

2 Nov. 20", 1911.—Recognizance forfeited and respited to Feb'y Sessions, 1912.

Dec. 2", 1911.—Motion of G. T. Kincaid, Att'y for Defendant, for 20 days' additional time in which to file exceptions filed.

And now, Dec. 2", 1911, Motion granted and 20 days' additional time allowed defendant to file exceptions for a new trial allowed. By the Court, W.

Dec. 2, 1911.—Motion for order authorizing and directing Court Stenographer to file record filed.

And now, Dec. 2, 1911—Motion granted and the Court Stenographer is hereby directed to write out or transcribe, and file of record his notes of testimony, judge's charge, etc., in above action. By the Court, W.

Jan. 18", 1912, Notes of testimony filed.

Jan. 25, 1912.—Reasons for new trial filed.

June 24", 1912—Opinion of Emory A. Walling, P. J. filed with the following order: And now, June 24, 1912, the rule for a new trial and also the rule in arrest of Judgment in above stated case are discharged. Per Curiam, W.

To which same day the defendant excepts and an exception is sealed. Emory A. Walling, P. J. (L. S.)

And now, July 1, 1912, the sentence of the Court is that the defendant A. B. Crowl pay a fine of Twenty-five dollars to the Dairy and Food Commissioner or his agent for the use of the Commonwealth and pay the costs of prosecution or give security to the Sheriff to pay the same within ten days, and stand committed until this sentence is complied with. Per Curiam.

To which same day the defendant excepts and an exception is sealed. Emory A. Walling, P. J. (L. S.)

Upon petition for a supersedeas, the Court made the following order: And now, July 1, 1912, it is ordered that the sentence in the within case be stayed until an appeal can be taken by the said defendant, and thereafter said appeal to be a supersedeas to stay the sentence imposed until the said appeal can be determined and disposed of. Bond required in \$200.00. Per Curiam, W.

July 3, 1912, Bond on Appeal to the Superior Court of Penna. in the sum of \$200.00 with A. B. Crowl as principal, and C. L. Alexander as surety, filed.

July 15", 1912, Certiorari to the Court of Quarter Sessions for the County of Erie, returnable the first Monday of August A. D. 1912, filed in the office of the Clerk of Courts of Erie County.

4 STATE OF PENNSYLVANIA,  
*County of Erie, ss:*

I, H. P. Gillett, Clerk of the Quarter Sessions Court in and for the County of Erie, State of Pennsylvania, do hereby certify that the foregoing pages contain a true and correct — of the docket entry in the matter of the case of Commonwealth of Pennsylvania versus A. B. Crowl and W. F. Lewis, as appears by the record in said case, No. 32, September Sess., 1911 as full and entire as the same remains of record in my office.

In witness whereof, I have hereunto set my hand and the seal of said Court, at Erie, this 25th day of July, A. D. 1912.

[SEAL.]

H. P. GILLETT,  
*Clerk of Court of Quarter Sessions.*

5 STATE OF PENNSYLVANIA,  
*County of Erie, ss:*

[SEAL.]

I, H. P. Gillett, Clerk of the Quarter Sessions Court in and for said County, do hereby certify that the above and foregoing pages contain a true copy and correct transcript of the record and pro-

ceedings in said case, No. 32 September Sessions, 1911, as full and entire as the same remains of record in my office.

In testimony whereof, I have hereunto set my hand and the seal of said Court at Erie, the 25th day of July, A. D. 1912.

H. P. GILLETT,  
*Clerk Court of Quarter Sess.*

STATE OF PENNSYLVANIA,  
*County of Erie, ss:*

I, Emory A. Walling, President Judge of the Sixth Judicial District (or Circuit), composed of the County of Erie, do certify that ——— whose name appears to the above and foregoing certificate, is the Clerk of the Court of Quarter Sessions of the County of Erie, and the seal by him thereto affixed is the seal of said Court; and also, that his attestation of the said record is in due form.

Witness my hand and seal this 25th day of July, A. D. 1912.

EMORY A. WALLING, [L. s.]  
*President Judge.*

STATE OF PENNSYLVANIA,  
*County of Erie, ss:*

[SEAL.]

I, H. P. Gillett, Clerk of the Quarter Sessions Court in and for said County, do certify that the Hon. Emory A. Walling is now, and was at the time of signing the above certificate, President Judge of the Sixth Judicial District of said Commonwealth, composed of the County of Erie, duly commissioned and qualified according to law, and that his signature to the said certificate is genuine.

6 In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at Erie, this 25th day of July, A. D. 1912.

H. P. GILLETT,  
*Clerk Court of Quarter Sessions.*

7 COMMONWEALTH OF PENNSYLVANIA

vs.

A. B. CROWL and W. F. LEWIS.

Warrant issued 14th day of August, 1911, by Charles Klemm, Alderman, to John Flannigan, Constable; Oath of G. M. Pelton, Charging defendant with of selling Chocolate Ice Cream less than 8 per centum of Butter Fat.

*Costs.*

Information .....	.60
War. A .....	.60
Docket Entry .....	.50
Issuing .....	.75
2 oaths .....	.20
Transcript .....	.75

Bail .....	.50
Bail .....	.50
	<hr/>
	4.40
Witnesses:	
G. M. Pelton .....	3.92
John A. Evans .....	.56
	<hr/>
	4.48
Constable John Flannigan Serv. Warr't. ....	2.00
Mileage .....	4.56
	<hr/>
	6.56
	<hr/>
Total .....	15.44

Before me the subscriber, personally appeared G. M. Pelton, who being duly sworn according to law deposes and says, that on the 21st day of June, A. D. 1911, A. B. Crowl and W. F. Lewis at Corry, in the County aforesaid, did unlawfully by himself, herself, itself, or themselves, or by his, her, its or their agents, servants or employes, manufacture, sell, offer for sale, expose for sale, and had in their possession with intent to sell, a certain article, to-wit—Chocolate Ice Cream which then and there contained less than 8 per centum butter-fat, contrary to the provisions of the Act of the General Assembly of the Commonwealth of Pennsylvania, approved the twenty-fourth day of March, A. D. 1909.

And now Aug. 30th, 1911, comes M. L. Davis, Attorney for the Complainant and moves the Alderman to amend the information in this case by inserting after the word "Butter-fat" in the eleventh line thereof, the following; "and not then and there being flavored with fruit or nuts."

Sworn and subscribed to before me this 30th day of August, 1911, by G. M. Pelton the Prosecutor.

Def'ts object to the amendment, and amendment allowed, the objection over-ruled, in favor of the prosecution.

Aug. 30th, 1911, Def'ts refuse to plead, and the Alderman enters a plea of not Guilty.

G. M. Pelton sworn for Commonwealth and James A. Evans sworn for Commonwealth.

After hearing all proofs, Def'ts held in the sum of (\$200.00) Bail each to answer next term of Quarter Session.

Def'ts give bail.

Each held in the sum of \$200.00 each, conditioned that Defendant shall appear at next Court of Quarter Sessions of Erie County to answer above charge, and not depart said Court until discharged by due course of law. A. B. Crowl and W. F. Lewis, and C. L. Alexander, each held in the sum of — to appear and testify in above stated case.

ERIE COUNTY, ss:

I hereby certify that above is a correct Transcript of the proceedings had before me in above cause, and of record on my docket. In testimony whereof, I have hereunto set my hand and seal at Erie the 1st day of September 1911.

CHARLES KLEMM, *Alderman*. [SEAL.]

Endorsement: In the Court of Quarter Sessions of Erie County—Sept. Term 1911 No. 32—Commonwealth vs. A. B. Cowl and W. F. Lewis—Before Charles Klemm Alderman—Charge: Violating Pure Food Law.

8. In the Court of Quarter Sessions of the Peace for the County of Erie.

32, September Sessions, 1911.

COUNTY OF ERIE, ss:

The grand inquest of the Commonwealth of Pennsylvania, now inquiring in and for the body of the County of Erie, upon their respective oaths and affirmations, do present, That A. B. Cowl and W. F. Lewis late of Said county, yeomen, on the twenty-first day of June, in the year of our Lord one thousand nine hundred and eleven, with force and arms, at the county aforesaid and within the jurisdiction of this Court, did unlawfully, by himself and themselves, and by his and their agents, servants and employes, sell, offer for sale, expose for sale, and have in their possession with intent to sell, ice-cream which was then and there unlawfully adulterated in the manner following, to-wit:

By containing less than eight per centum of butter fat and not being then and there flavored with fruit or nuts, Contrary to the form of the Act of the General Assembly in such cases made and provided, and against the peace and dignity of the Commonwealth of Pennsylvania.

W. FITT GIFFORD,  
*District Attorney*.

Endorsement: No. 32 September Sessions 1911.—Commonwealth of Pennsylvania vs. A. B. Cowl and W. F. Lewis—Indictment for Selling adulterated ice-cream. Misdemeanor.—A true bill—Wm. Hopkins, Foreman, Sept. 12th, 1911—And now, to-wit: A. D. 190—The Defendant being arraigned, plead—(Indct. quashed) G. M. Pelton, Prosecutor—Witnesses G. M. Pelton James A. Evans.



9 In the Court of Quarter Sessions of the Peace for Erie  
County, State of Pennsylvania.

No. 32, September 1911, Session 19—.

COMMONWEALTH

VS.

A. B. CROWL et al.

*Commonwealth's Bill of Costs, September, 1911, Session 19—*

Name.	Miles direct travel, @ cts.	Amount.	Attendance in days, \$1.50.	Total am't due.	Received the amount opposite my name.	Date pay- ment.
G. M. Pelton.....	58	3.48	1	4.98		
James A. Evans..	....	.....	1	1.50		
F. T. Aschman...	148	8.88	1	10.38		
Clerk's fee for certifying bill.....				.25		
Whole amount of bill.....				\$17.11		

ERIE COUNTY, ss:

Personally appeared before me F. H. Watson who being duly sworn, saith the above bill of costs is correct, that the witnesses named were necessary, material and in attendance as above stated.

R. H. WATSON.

Sworn and subscribed in open Court this 12 day of Sept. 1911.

H. P. GILLET, Clerk.

I hereby certify That the within named witnesses were subpoenaed by my order, were in attendance, and deemed necessary and material to the trial of the case.

\_\_\_\_\_,  
District Attorney.

\_\_\_\_\_, 19—.

Endorsement: No. 32, September Session, 1911—Commonwealth  
vs. A. B. Crowl et al.—Commonwealth's Bill of Costs—Filed Sept.  
12, 1911.

10 ERIE COUNTY, ss:

[SEAL.]

The Commonwealth of Pennsylvania to G. M. Pelton, James A.  
Evans, F. T. Aschman, Greeting:

We command you, and each of you, that, setting aside all business  
and excuses, you be and appear in your proper persons before our

Judges at Erie, at a Court of General Quarter Sessions of the Peace, to be holden for the County of Erie, the 12th day of September 1911, at the hour of 2 o'clock P. M. next, to testify all and singular those things you know between us and A. B. Crowl et al. on an indictment for Violation Pure Food Laws on the part of the Commonwealth, and this you are not to omit under a penalty of one hundred pounds.

Witness the Hon. Emory A. Walling, President Judge of our said Court, at Erie, the 5th day of September in the year of our Lord, one thousand nine hundred and eleven.

H. P. GILLETT, *Clerk*.

Endorsement: No. 32 September Sess. 1911—Commonwealth vs. A. B. Crowl et al.—Subpoena on part of Commonwealth, Erie, Pa., Sept. 8 and 12, 1911—Served personally on Within Named Witness. Fees: Service on one witness at \$.50—\$.50, Service on 2 witnesses at 15¢=30c., 1 Miles direct travel at 12¢=12¢ \$.92—F. H. Watson Sworn and subscribed before me this 13 day of Sept. 1911. H. P. Gillett, Clerk.

11 In the Court of Quarter Sessions, Erie County, Pennsylvania,  
— Term, 1911.

No. —.

COMMONWEALTH

vs.

A. B. CROWL and W. F. LEWIS.

*Demurrer.*

And, now, November 15, 1911, the above named defendants by Walter Jeffreys Carlin and Gerry Kincaid, their attorneys, demurr to the indictment in the above stated case, and say that the indictment is not sufficient in law to maintain a charge upon which the defendants could be convicted and, in support of this demurrer, assign the following reasons:

1. That the indictment does not charge a crime.
2. That no Act of of the General Assembly makes it a crime to sell ice cream containing less than eight (8) per cent of butter fat, as the act approved March 24, 1909, was repealed by the enactment of the so-called pure food law approved May 13, 1909.
3. That the indictment does not contain a specific description of the offense and does not described the offense so that the defendant may know how to answer and that a conviction or acquittal might be pleaded in bar to another indictment for the same offense.
4. That the food acts of March 24, 1909, and May 13, 1909, both commit to the Dairy & Food Commissioner the sole power to commence prosecution for its violation and is therefore unconstitutional and void under the Constitution of the United States and the Constitution of Pennsylvania.



5. That the information or complaint and said indictment  
12 does not show that the prosecution was commenced by the Dairy and Food Commissioner as required by the act, but, on the contrary, shows that it was not commenced by said official.

6. So much of the complaint and indictment as sets forth any charge other than actual sale of ice cream should be quashed and dismissed for the reason that the statute does not make it an offense to "manufacture"—"offer for sale"—"expose for sale"—"have in his possession with intent to sell"—ice cream which violates section 4 of the Act of General Assembly of the Commonwealth of Pennsylvania, approved the 24th day of March, 1909. The provisions in section 1 of said act only apply to section 2 thereof, which defines adulterations. Section 4 does not define adulteration, it fixes a standard for which a penalty for the violation thereof is provided by section 6.

7. So much of the information or complaint and indictment as charges that the sale was by an agent, servant or employee should be dismissed for the reason that the statute does not make it an offense to sell ice cream which violates section 4 of the above named act by an agent, servant or employee. These provisions of section 1 only apply to section 2 of said act which defines adulteration. Section 4 does not define an adulteration, it fixes a standard and a penalty is provided in section 6 and that is merely a penalty for a personal sale.

8. That as the statute does not make it an offense to sell by an agent, servant or employee, ice cream in violation of section 4 of the said act, but in fact whether the statute does or not make such an act an offense, the information or complaint is in a disjunctive form, making the charge indefinite and uncertain and the information fails to charge a crime for the reason that it does not show whether the offense was committed by the defendants or by one of their  
13 agents, servants or employees.

9. That the act under which the charge is made is invalid, unconstitutional and void in that it violates Section 1, Article XIV of the amendments to the Constitution of the United States in that it abridges the privileges and immunities of citizens of the United States and deprives them of liberty and property without due process of law and denies them the equal protection of the law.

10. That the act under which the charge is made is unconstitutional and void under the Constitution of Pennsylvania.

Wherefore defendants ask that the Demurrer be and that they be discharged.

WALTER JEFFREYS CARLIN,  
GERRY KINCAID,

*Attorneys for Defendants.*

Endorsement: No. 32 Sept. 1911—November 15, 1911. Demurrer overruled Per Curiam W.—To which same day the defendants except and an exception is sealed. Emory A. Walling. (L. S.) P. J.—Gerry T. Kincaid, Blaine Kincaid, Attorneys-at-law, National Bank Building, Corry, Pa.

14 In the Court of Quarter Sessions of Erie County.

COMMONWEALTH

vs.

A. B. CROWL and W. F. LEWIS.

Charge: Selling Adulterated Ice Cream.

Now comes the defendants by Walter Jeffreys Carlin and Gerry Kincaid, their attorneys, and move to quash the indictment and for the discharge of the defendants and for grounds of said motion state the following:

1. That the information or complaint filed does not charge a crime and that the indictment does not charge a crime.

2. That no act of the General Assembly makes it a crime to sell ice cream containing less than eight (8) per cent of butter fat, as the act approved March 24, 1909, was repealed by the enactment of the so-called pure food law approved May 13, 1909.

3. That the indictment does not contain a specific description of the offense and does not describe the offense so that the defendant may know how to answer and that a conviction or acquittal might be pleaded in bar to another indictment for the same offense.

4. That the food acts of March 24, 1909, and May 13, 1909, both commit to the Dairy & Food Commissioner the sole power to commence prosecution for its violation and is therefore unconstitutional and void under the Constitution of the United States and the Constitution of Pennsylvania.

5. That the information or complaint and said indictment does not show that the prosecution was commenced by the Dairy and Food Commissioner as required by the act, but, on the contrary, shows it was not commenced by said official.

15 6. So much of the complaint and indictment as sets forth any charge other than an actual sale of ice cream should be quashed and dismissed for the reason that the statute does not make it an offense to "manufacture"—"offer for sale"—"expose for sale"—"have in his possession with intent to sell"—ice cream which violates section 4 of the act of General Assembly of the Commonwealth of Pennsylvania, approved the 24th day of March, 1909. The provisions in section 1 of said act only apply to section 2 thereof, which defines adulterations. Section 4 does not define adulteration, it fixes a standard for which a penalty for the violation thereof is provided by section 6.

7. So much of the information or complaint and indictment as charges that the sale was by an agent, servant or employee should be dismissed for the reason that the statute does not make it an offense to sell ice cream which violates section 4 of the above named act by an agent, servant or employee. These provisions in section 1 only apply to section 2 of said act which defines adulteration. Section 4 does not define an adulteration, it fixes a standard and a

penalty is provided in section 6 and that is merely a penalty for a personal sale.

8. That as the statute does not make it an offense to sell by an agent, servant or employee, ice cream in violation of section 4 of the said act, but in fact whether the statute does or not make such an act an offense, the information or complaint is in a disjunctive form, making the charge indefinite and uncertain and the information

16 fails to charge a crime for the reason that it does not show whether the offense was committed by the defendant or by one of his agents, servants or employees.

9. That the act under which the charge is made is invalid, unconstitutional and void in that it violates Section 1, Article XIV of the amendments to the Constitution of the United States in that it abridges the privileges and immunities of citizens of the United States and deprives them of liberty and property without due process of law and denies them the equal protection of the law.

10. That the act under which the charge is made is unconstitutional and void under the Constitution of Pennsylvania.

Wherefore defendants ask that the indictment be quashed and that they be discharged.

WALTER JEFFREYS CARLIN,  
GERRY KINCAID,

*Attorneys for Defendant.*

Endorsement: #32 Sept. 1911—Quarter Sessions—Erie County—Commonwealth vs. A. B. Crowl & W. F. Lewis—Original Motion to Quash Indictment—Walter Jeffreys Carlin, Attorney for Defendants, 2 Rector Street, New York City—Borough of Manhattan—Due and timely service of a copy of the within — is this — day of — 191— hereby admitted. — — —, Attorney for — — —. Nov. 15 1911. Motion granted, Per Curiam. See Stenographer's notes.

17 In the Court of Quarter Sessions of the Peace for the County of Erie.

November Sessions, 1911.

COUNTY OF ERIE, ss:

The grand inquest of the Commonwealth of Pennsylvania, now inquiring in and for the body of the County of Erie, upon their respective oaths and affirmations, do present, That A. B. Crowl and W. F. Lewis late of said county, yeomen on the twenty-first day of June in the year of our Lord one thousand nine hundred and eleven with force and arms, at the county aforesaid and within the jurisdiction of this Court, did unlawfully, by himself and themselves, and by his and their agents, servants and employees, sell, offer for sale, expose for sale, and have in their possession with intent to sell, a certain article to-wit, chocolate ice-cream, which then and there contained less than eight per centum butter-fat, and not then and there

being flavored with fruit or nuts. Contrary to the form of the Act of the General Assembly in such case made and provided, and against the peace and dignity of the Commonwealth of Pennsylvania.

W. PITT GIFFORD,  
*District Attorney.*

Endorsement: No. 32 September Sessions 1911—Commonwealth of Pennsylvania vs. A. B. Crowl and W. F. Lewis—Indictment for selling ice-cream deficient in butter-fat Misdemeanor—A true bill—J. W. Bonnell Foreman—Nov. 15, 1911—And now, to-wit: Nov. 15 A. D. 1911 the Defendants being arraigned, plead not guilty, G. T. Kincaid, W. J. Carlin Attys. for Dft. G. M. Pelton Prosecutor.—Witnesses G. M. Pelton, James A. Evans, F. T. Aschman.

8 In the Court of Quarter Sessions of Erie County, Pa.

No. —, Term 1911.

COMMONWEALTH

VS.

A. B. CROWL and W. F. LEWIS.

The defendants by their attorneys respectfully request the Court to charge the jury as follows:

1. That the defendants are presumed to be innocent until proven guilty.
2. That the burden of proof is upon the Commonwealth to establish the guilt of the defendants.
3. That unless the jury find from the evidence that the defendants are guilty beyond any reasonable doubt the defendants should be acquitted.
4. That each and every juror should be satisfied beyond any reasonable doubt of the guilt of the defendants before bringing in a verdict of guilty.
5. That the Act of Assembly under which the indictment is drawn has been repealed by the Act of Assembly of May 13, 1909, and therefore the verdict of the jury must be not guilty.
6. That unless the jury find from the evidence that the product sold was chocolate ice cream the verdict of the jury must be not guilty.
7. That unless the jury find from the evidence beyond a reasonable doubt that fruit or nuts were not used for flavoring in the product sold the verdict of the jury must be not guilty.
8. That if the jury find from the evidence that the guilt or innocence of the defendants depends upon the accuracy or completeness of a chemical analysis of the substance sold, that they should be satisfied beyond any reasonable doubt that said analysis was accurate and complete before convicting the defendants.
9. That unless the jury find beyond any reasonable doubt that the

product sold was ice cream, and that it contained less than eight per cent butter fat the verdict of the jury should be not guilty.

10. That the Act of Assembly under which the indictment is drawn is invalid and unconstitutional and void in that it violates Sec. 1, Article XIV of the Amendments to the Constitution of the United States, and there can be no conviction of the defendants under the same.

11. That the Act of Assembly under which the indictment is drawn is unconstitutional and void under the Constitution of the State of Pennsylvania and there can be no conviction under the same.

12. That unless the jury find from the evidence that the prosecution was commenced by the Dairy and Food Commissioner of the State of Pennsylvania the defendants cannot be convicted.

13. That the evidence offered on the part of the commonwealth is not sufficient to warrant the jury in finding W. F. Lewis one of the defendants guilty.

14. That under the law and the evidence the verdict of the jury must be not guilty.

W. J. CARLIN,  
G. T. KINCAID,  
*Att'ys for D'fts.*

20 In the Court of Quarter Sessions of the Peace of Erie County,  
Pa., September Session, 1911.

No. 32.

COMMONWEALTH

vs.

A. B. CROWL and W. F. LEWIS, Defendant.

We, the jury empanelled and sworn to try the issue joined between the Commonwealth of Pennsylvania, and A. B. Crowl and W. F. Lewis, Find Defendant W. F. Lewis Not Guilty; A. B. Crowl Guilty as indicted.

C. Z. SMILEY, *Foreman.*

Date Nov. 16, 1911.

Endorsement: No. 32. Sept. Term 1911—Commonwealth vs. A. B. Crowl and W. F. Lewis—Verdict of the Jury at Session, 19—.



21 In the Court of Quarter Sessions of the Peace for Erie County, State of Pennsylvania, September Session, 1911.

No. 32.

COMMONWEALTH

vs.

A. B. CROWL and W. F. LEWIS.

*Commonwealth's Bill of Costs, November Session, 1911.*

Name.	Miles direct travel, @ cts.	Amount.	Attendance in days, \$1.50.	Total am't due.	Received the amount opposite my name.	Date payment.
G. M. Pelton.....	58	3.48	2	6.48		
James J. Evans..	....	.....	2	3.00		
F. T. Aschman...	148	8.88	3	13.38		
Clerk's fee for certifying bill.....				.25		
Whole amount of bill.....				\$23.11		

ERIE COUNTY, ss:

Personally appeared before me G. M. Pelton who being duly sworn, saith the above bill of costs is correct, that the witnesses named were necessary, material and in attendance as above stated.

G. M. PELTON.

Sworn and subscribed in open Court this 16 day of Nov., 1911.

H. P. GILLETT, *Clerk.*

I hereby certify That the within named witnesses were subpoenaed by my order, were in attendance, and deemed necessary and material to the trial of the case.

\_\_\_\_\_,  
*District Attorney.*

—, 19—.

Endorsement: No. 32. September Session, 19— Commonwealth vs. A. B. Crowl, et al.—Commonwealth's Bill of Costs—Nov. 16, 1914. Filed.

22 In the Court of Quarter Sessions of Erie County, Pa., Term,  
1911.

No. —.

COMMONWEALTH

VS.

A. B. CROWL and W. F. LEWIS.

*Motion in Arrest of Judgment.*

And, now, November 20, 1911, comes W. J. Carlin and G. T. Kincaid, Attorneys for A. B. Crowl, the above named defendant, and move the Court for a- arrest of judgment in the above entitled case, and in support of the same assign the following reasons:—

1. That the indictment does not charge a crime.
2. That no Act of the General Assembly of Pennsylvania makes it a crime to sell ice cream containing less than eight (8) per cent of butter fat, as the Act approved March 24, 1909, was repealed by the enactment of the so called pure food law approved May 13, 1909.
3. That the indictment does not contain a specific description of the offense, and does not describe the offense so that the defendant may know how to answer and that a conviction or acquittal might be pleaded in bar to another indictment for the same offense.
4. That the food Acts of March 24, 1909 and May 13, 1909, both commit to the Dairy & Food Commissioner the sole power to commence prosecutions for the violation of the same and are therefore unconstitutional and void under the constitution of the United States and of the Constitution of Pennsylvania.
5. That neither the complaint nor indictment shows that the prosecution was commenced by the Dairy & Food Commissioner, as required by the Act, nor by his direction, or by any one in his employ, but on the contrary shows that it was not commenced by said official.
6. That the indictment is too indefinite on which to sustain a conviction in that it charges that said defendants did sell,  
23 offer for sale, expose for sale, and have in possession with intent to sell, ice cream which violates section 4 of the Act of Assembly, approved March 24, 1909. Whereas the provisions of Sec. 1, of said Act making it an offense to offer for sale, expose for sale, and have in possession with intent to sell, & apply to the 2nd Section of said Act, and not to the 4th Section of the same.
7. That the Act of Assembly of March 24, 1909, known as the Ice Cream Act, in that it attempts in Section 4, of the same, to establish a standard for butter fat in ice cream, and absolutely prohibits the sale of ice cream containing less than the standard of butter fat, no matter how wholesome, is unconstitutional.
8. That the Act under which the indictment is drawn is invalid and unconstitutional and void in that it violates Section 1, Article 14, of the amendments to the Constitution of the United States, in that it abridges the privileges and immunities of citizens of the



United States and deprives them of liberty and property without due process of law and denies them the equal protection of the Law.

10. That the Act, under which the indictment is drawn is unconstitutional and void under the Constitution of Pennsylvania.

Wherefore defendant asks that said motion be sustained and defendant be discharged.

W. J. CARLIN,  
G. T. KINCAID,  
*Attorneys for Defendant.*

Endorsement: Commonwealth vs. A. B. Crawl, W. F. Lewis—  
Motion in Arrest of Judgment—Nov. 25 1911—Rule to show cause  
granted Per Curiam W—Filed in Clerk of Court's Office Erie Co.  
Pa. Nov. 20, 1911—Gerry T. Kincaid, Blaine Kincaid Attorneys  
at law, National Bank Building Corry, Pa.

24 In the Court of Quarter Sessions of Erie County, Pa.

No. —, — Term, 1911.

COMMONWEALTH  
vs.  
A. B. CRAWL and W. F. LEWIS.

*Motion for New Trial.*

And now Nov. 20, 1911, comes W. J. Carlin and G. T. Kincaid,  
Attorneys—A. B. Crawl, above named defendant, and move the  
Court for a new trial in the above case.

W. J. CARLIN,  
G. T. KINCAID,  
*Attorneys for Defendant.*

And now Nov. 20, 1911, rule to show cause granted why the  
defendant A. B. Crawl should not have a new trial. Defendant to  
have 15 days in which to file his reasons for the same.

PER CURIAM.  
W.

Endorsement: Commonwealth vs. A. B. Crawl, W. F. Lewis—  
Motion for New Trial—Filed in Clerk of Court's Office Erie Co. Pa.  
Nov. 20, 1911—Gerry T. Kincaid Blaine Kincaid Attorneys at law  
National Bank Building Corry, Pa.

25 In the Court of Quarter Sessions of Erie County, Pa.

No. —, — Term, 1911.

COMMONWEALTH

VS.

A. B. CROWL and W. E. LEWIS.

And now Dec. 2, 1911, comes G. T. Kincaid Attorney for defendant and moves the Court for an order authorizing and directing the Court Stenographer to transcribe or write out and file of record his notes in the above entitled action including, notes of testimony judge's charge, etc.

G. T. KINCAID,  
*Att'y for D'ft.*

And now Dec. 2, 1911, motion granted and the Court Stenographer is hereby directed to write out or transcribe and file of record his notes of testimony, judge's charge, etc. in above action.

BY THE COURT.  
W.

Endorsement: No. 32 Sept. Term, 1911—Commonwealth vs. A. B. Crowl—Motion directing Court Stenographer to file Notes of Testimony, etc.—Kincaid.

26 In the Court of Quarter Sessions in Erie County, Pa.

No. —, — Term, 1911.

COMMONWEALTH

VS.

A. B. CROWL and W. E. LEWIS.

And now Dec. 2, 1911, comes G. T. Kincaid, Attorney for defendant in the above entitled case and moves the Court for 20 days additional time in which to file exceptions for a new trial in the above action for the reason that the notes of the stenographer have not as yet been written out and filed of record in said case.

G. T. KINCAID,  
*Att'y for D'ft.*

And now Dec. 2, 1911, motion granted and 20 days' additional time allowed defendant to file exceptions for a new trial allowed.

BY THE COURT.  
W.

Endorsement: No. 32 Sept. Term, 1911—Commonwealth vs. A. B. Crowl—Motion for 30 days' additional time in which to file reasons for new trial. Kincaid.

27 In the Court of Quarter Sessions of Erie County, Pa.

No. —, — Term, 1912.

COMMONWEALTH

vs.

A. B. CROWL and W. F. LEWIS.

*Reasons for a New Trial.*

The court is respectfully requested to grant a new trial in the above entitled case for the following reasons:

1. Because the verdict is against the evidence.
2. Because the verdict is against the weight of evidence.
3. Because incompetent evidence was admitted.
4. Because competent evidence offered by defendant was excluded.
5. Because the court refused to charge "that if the jury find from the evidence that the guilt or innocence of the defendants depends upon the accuracy or completeness of a chemical analysis of the substance sold, that they should be satisfied beyond any reasonable doubt that said analysis was accurate and complete before convicting the defendants."

6. Because the court refused to charge "that the Act of the Assembly under which the indictment is drawn is invalid and unconstitutional and void in that it violates Sec. 1, Article XIV of the Amendments to the Constitution of the United States, and there can be no conviction of the defendants under the same."

7. Because the court refused to charge "That the Act of Assembly under which the indictment is drawn is unconstitutional and void under the Constitution of the State of Pennsylvania and there can be no conviction under the same."

8. Because the court refused to charge "that unless the jury find from the evidence that the prosecution was commenced by the Dairy and Food Commissioner of the State of Pennsylvania the defendants cannot be convicted."

9. Because the court refused to charge "that the evidence offered on the part of the Commonwealth is not sufficient to warrant the jury in finding W. F. Lewis, one of the defendants, guilty."

10. Because the court refused to charge "that under the law and the evidence the verdict of the jury must be not guilty."

11. Because the charge of the court was highly prejudicial to the defendant.

WALTER JEFFREYS CARLIN,  
GERRY T. KINCAID,

*Attorneys for Defendant.*

January 23, 1912.

Endorsement: No. 32 Sept. 1911—Comth. vs. A. B. Crowl & W. F. Lewis—Reasons for New Trial—Filed in Clerk of Court's Office Erie Co. Pa. Jan. 25 1912.

29 In the Court of Quarter Sessions of the Peace for the County of Erie, Pennsylvania.

No. 32, September Sessions, 1911.

COMMONWEALTH

VS.

A. B. CROWL.

*Rule for a New Trial and in Arrest of Judgment.*

Defendant was indicted and convicted for selling ice-cream deficient in butter fat, under the Act of March 24, 1909, P. L. 63; Sections 4 and 6 of said Act being as follows:

Section 4. "No ice-cream shall be sold within the State containing less than eight (8) per centum butter-fat, except where fruit or nuts are used for the purpose of flavoring, when it shall not contain less than six (6) per centum butter-fat."

Section 6. "Any person, firm, or corporate body who shall violate any of the provision- of this act shall be guilty of a misdemeanor, and, upon conviction thereof, shall be sentenced to pay a fine of not less than twenty-five (25) dollars, nor more than fifty (50) dollars."

It is earnestly urged for defendant that said Act was repealed by the later Act of May 13, 1909, P. L. 520. "Relating to food, etc.,"

But there is nothing in the later Act fixing a standard of butter-fat for ice-cream or that in any manner conflicts with or supercedes the above quoted 4th section of the earlier Act. It is not necessary here to decide whether or not some of the other provisions of the earlier Act are abrogated by the later. We are clearly satisfied that so far as relate to the provisions involved in this case there was no repeal.

30 Implied repeal is not favored; and in our opinion those two statutes are in pari materia, and as far as practicable should be construed together.

The said ice-cream act is in lien with other recent pure food legislation, is intended to protect the public from deception and from imposition, and is in our opinion valid and a proper exercise of the police power of the Commonwealth. It is less drastic than the Oleomargarine Act of May 21, 1885, P. L. 22, and that was sustained both by our Supreme Court and by the Supreme Court of the United States.

Powell vs. Commonwealth, 114 Pa. 265.

Powell vs. Pennsylvania, 127 U. S. 678.

And it is not as drastic as the Act of June 8, 1911, P. L. 712, "Relating to Milk." Within reasonable bounds it is for the legislature and not for the courts to say what per cent of butter-fats ice-cream must contain. It is a well-known article of food, and the manifest meaning of the statute is that when sold it must contain

the per cent of butter-fat stated in the Act. In regulating the sale of food the legislature is not limited to the question of public health. Commonwealth vs. Kevin, 202 Pa. 23. Such legislation is beneficial to the public and should not be construed so strictly as to defeat the plain legislative intent. In the above cited case of Commonwealth vs. Kevin, 202 Pa., on Page 27, the Supreme Court say: "The object of the statute is to protect the public health by securing pure food and to prevent fraud and deception in the manufacture and sale of adulterated articles of food. The purpose of the legislature in the passage of the act is most commendable and the statute should receive a construction by the courts that will fully and effectively accomplish the object of its enactment." See also Stull vs. Reber, 215 Pa. 156; Commonwealth vs. Shoben, 215 Pa. 595; Bechtel's Election Expenses, 29 Superior Court, on page 302.

The fact that the Dairy and Food Commissioner is charged with the enforcement of the Act does not prevent any other citizen from instituting prosecutions thereunder, and in our opinion is not material.

And now, June 24, 1912, the rule for a new trial and also the rule in arrest of judgment in above stated case are discharged.

PER CURIAM.

W.

To which same day the defendant excepts and an exception is sealed.

EMORY A. WALLING, P. J. [L. s.]

Endorsement: No. 32, Sept. Sessions, 1911. In the Court of Quarter Sessions of the Peace for the County of Erie, Pennsylvania. Commonwealth vs. A. B. Crowl. Opinion. Filed in Clerk of Court's Office, Erie Co., Pa., Jun- 24, 1912.

2 In the Court of Quarter Sessions of the County of Erie.

No. 32, Sept. Term, 1911.

COMMONWEALTH

vs.

A. B. CROWELL.

to the Honorable the Judges of the Court of Quarter Sessions of said County:

The petition of A. B. Crowell the defendant above named, respectfully represents:

That at the Court of Quarter Sessions held in and for said County Erie at the Nov. Term, 1911, he was convicted upon an indictment charging defendant with having sold ice cream containing less percent of butter fat than is required by the Act of Assembly March 24, 1909; and on the 24th day of June 1912, his motion



for a new trial and suspension of sentence was denied by your honorable Court, and he was on July 1, 1912, *he was* sentenced to pay a fine of twenty five dollars and costs.

That the Court erred in refusing the application of defendant for a new trial and suspension of sentence.

That your petitioner intends at once to take an appeal to the Superior Court from the judgment and sentence of the said Court of Quarter Sessions. That your petitioner prays your honorable Court to make an order staying said sentence until an appeal can be taken to the Superior Court, and that thereafter said appeal shall be a supersedeas to stay the sentence imposed, until the said appeal can be determined and disposed of, upon such conditions and terms as you- honorable Court may see fit to impose.

A. B. CROWL.

STATE OF PENNSYLVANIA,  
*Erie County, ss:*

A. B. Crowl being duly sworn according to law deposes and says: That the facts set forth in the foregoing petition are true and correct.

A. B. CROWL.

Sworn and subscribed before me July 1, 1912.

[SEAL.]

GERRY T. KINCAID,  
*Notary Public.*

My Commission Expires Jan. 30, 1915.

33 And now July 1, 1912, it is ordered that the sentence in the within case be stayed until an appeal can be taken by the said defendant, and thereafter said appeal to be a supersedeas to stay the sentence imposed, until the said appeal can be determined and disposed of. Bond required in \$200.00.

PER CURIAM.

Endorsement: No. —. Term, 1911. Commonwealth vs. A. B. Crowl. Petition for supersedeas. W. J. Carlin. Kincaid & Kincaid, Attorneys at Law, Corry, Pa. Filed in Clerk of Court's Office, Erie Co., Pa., Jul- 7, 1912.

34 *Commonwealth's Witnesses.*

G. M. Pelton.....	6
James A. Evans.....	14-125
F. T. Ashman.....	45

*Defendants' Witnesses.*

Dr. Joseph A. Deghucc.....	60
Albert W. Smith.....	109
Charge to the jury.....	134

*Exhibits.*

Jar. page 13. (Exhibit A).  
Babcock bottle. Page 127. (Offer refused).



35 In the Court of Quarter Sessions of Erie County, Pa.

No. 32, September Sessions, 1911.

COMMONWEALTH

vs.

A. B. CROWL and W. F. LEWIS.

Tried before Hon. Emory A. Walling, and a Jury, at Erie, November 15, 1911.

Messrs. J. B. Brooks and M. L. Davis appearing for the Commonwealth.

Messrs. G. T. Kincaid and W. J. Carlin appearing for the Defendants.

And now, November 15, 1911, the above named defendants by Walter Jeffreys Carlin and Gerry Kincaid, their attorneys; demur to the indictment in the above stated case, and say that the indictment is not sufficient in law to maintain a charge upon which the defendants could be convicted and, in support of this demurrer, assign the following reasons:

1. That the indictment does not charge a crime.
- 36 2. That no Act of the General Assembly makes it — crime to sell ice cream containing less than eight per cent. of butter fat, as the act approved March 24, 1909, was repealed by the enactment of the so-called pure food law approved May 13, 1909.
3. That the indictment does not contain a specific description of the offense and does not describe the offense so that the defendant may know how to answer and that a conviction or acquittal might be pleaded in bar to another indictment for the same offense.
4. That the food acts of March 24, 1909, and May 13, 1909, both commit to the Dairy & Food Commissioner the sole power to commence prosecution for its violation and is therefore unconstitutional and void under the Constitution of the United States and the Constitution of Pennsylvania.
5. That the information or complaint and said indictment does not show that the prosecution was commenced by the Dairy and Food Commissioner as required by the act, but, on the contrary, shows that it was not commenced by said official.
6. So much of the complaint and indictment as sets forth  
37 any charge other than actual sale of ice cream should be quashed and dismissed for the reason that the statute does not make it an offense to "manufacture"—"offer for sale"—"expose for sale"—"have in his possession with intent to sell"—ice cream which violates section 4 of the Act of General Assembly of the Commonwealth of Pennsylvania, approved the 24th day of March, 1909. The provisions in section 1 of said act only apply to section 2 thereof, which defines adulterations. Section 4 does not define adulteration, and fixes a standard for which a penalty for the violation thereof is provided by section 6.

7. So much of the information or complaint and indictment as charges that the sale was by an agent, servant or employee should be dismissed for the reason that the statute does not make it an offense to sell ice cream which violates section 4 of the above named act by an agent, servant or employee. These provisions of section 1 only apply to section 2 of said act which defines adulteration. Section 4 does not define an adulteration, it fixes a standard and a penalty is provided in section 6 and that is merely a penalty for a personal sale.

8. That as the statute does not make it an offense to sell  
38 by an agent, servant or employee, ice cream in violation of section 4 of the said act, but in fact whether the statute does or not make such an act an offense, the information or complaint is in a disjunctive form, making the charge indefinite and uncertain and the information fails to charge a crime for the reason that it does not show whether the offense was committed by the defendants or by one of their agents, servants or employees.

9. That the act under which the charge is made is invalid, unconstitutional and void in that it violates Section 1, Article XIV of the amendments to the Constitution of the United States in that it abridges the privileges and immunities of citizens of the United States and deprives them of liberty and property without due process of law and denies them the equal protection of the law.

10. That the act under which the charge is made is unconstitutional and void under the Constitution of Pennsylvania.

By the Court: Demurrer overruled, to which defendants excepted and an exception is sealed.

EMORY A. WALLING, P. J. [SEAL.]

(Jury Sworn.)

39 G. M. PELTON, sworn, and examined by Mr. Davis, testified as follows:

Q. Where do you live?

A. Youngsville, Warren County, Pa.

Q. What is your occupation?

A. One of the special agents of the Dairy and Food Department of the State of Pennsylvania.

Q. I wish you would state if you know these defendants, Mr. Crowl and Lewis?

A. I do, yes sir.

Q. When, if at any time, did you visit their place of business, and what if anything did you purchase there?

A. On the 21st day of June, 1911, I was at the place of business of A. B. Crowl and W. F. Lewis, 22 North Center Street, Corry, Erie County, Pa., who conducts a confectionery and ice cream store and there I purchased one pint of chocolate ice cream from A. B. Crowl, one of the defendants. It was placed in a pint jar, I paid him fifteen cents for the same, placed the following label on the pint jar "4372, G. M. P., Crowl & Lewis, Corry, Pa., June 21, 1911, one pint chocolate ice cream, paid 15c, of A. B. Crowl."

Q. What did you do with this jar?

A. I delivered it to Prof. James A. Evans at his laboratory in this city on the same day, about 3.45 in the afternoon.

40 Q. I wish you would look at this jar and state what it is?

A. That is the jar that the ice cream was placed in—the jar I delivered to Prof. Evans, and also my label on the jar as I identified with my own handwriting.

Q. You say that is in your handwriting: the label?

A. Yes sir.

Q. What did you ask for, when you called for ice cream?

A. Chocolate ice cream.

Q. How did they give it to you?

A. Placed in this pint jar.

Q. They put it in the jar themselves?

A. Yes sir.

Q. I wish you would state if you have since had any talk with either of the defendants?

A. I have.

Q. Which one, if either?

A. About the 5th of August I saw Mr. Crowl and he told me—

Objected to, unless Mr. Lewis was present.

By the Court: It is competent evidence against Mr. Crowl.

The witness resuming:

A. Mr. Crowl told me he was one of the proprietors and he was one of the proprietors on the day the sale was made to me.

Mr. Davis, resuming:

41 Q. State if you had a conversation later with Mr. Lewis?

A. Later on about November 11, 1911, I saw Mr. Lewis at his place of business and he also told me that he was in partnership with Mr. Crowl and was at the time I bought the sample, on June 21, 1911.

Cross-examined by Mr. Carlin:

Q. Did you purchase any other products on June 21st?

A. Yes, sir.

Q. What did you do with this product that you put in this jar when you left the store?

A. I took it to the hotel and put it in my basket that I carried my samples in.

Q. Were there any other samples of ice cream in that basket?

A. There were.

Q. And you say you took this to Prof. Evans?

A. Prof. James A. Evans.

Q. What is he professor of?

Objected to by Commonwealth.

By the Court: He will be called as a witness; you can ask him.

Q. What did you purchase in this store?

A. Chocolate ice cream.

Q. Was it chocolate ice cream?

A. That is what I asked for.

42 Q. That is what you bought it for?

A. And it looked like chocolate ice cream.

Q. What does chocolate ice cream look like?

A. It looks like chocolate.

Q. What does chocolate look like?

A. I couldn't tell; I am not a chemist.

Q. Did you analyze this?

Objected to, for the reason that there is no testimony of his analyzing it and as not being cross-examination.

By Mr. Carlin: He states he knows what it is; I am entitled to find out how he knows it.

The Court: You can ask him the question.

Q. How do you know this was chocolate, outside of the fact that you asked for chocolate ice cream?

Counsel for the Commonwealth objects to the statement of the gentleman that the witness testified that he knew what it was. He said he did not; he said it looked like chocolate ice cream.

The Court: He said he bought some chocolate ice cream. They can test his knowledge whether it was chocolate ice cream.

43 A. Only in a general knowledge of buying up chocolate ice cream. I bought several samples of chocolate ice cream.

Q. And did you know that any of these samples were chocolate ice cream?

A. Only by the looks of them and what I purchased them for.

Q. And that is all the knowledge you have as to this sample being chocolate ice cream?

A. That is all the knowledge I have.

Q. When you say "they" put it into this receptacle, you mean that Mr. Crowl put it in?

A. I meant Mr. Crowl put it in.

Q. Mr. Lewis wasn't there?

A. Mr. Lewis wasn't present.

Q. You swore to the information in this case, didn't you?

A. I did.

Q. You swore that these men manufactured this ice cream?

Objected to.

The Court: The information is the better evidence if it is important.

Q. You swore to the second information, didn't you?

Objected to.

The Court: The information should be produced and handed to the witness, if it is competent in the case.

44 Q. The first conversation you had with Mr. Lewis was on November 11th?

A. I think it was.

Q. That was some time after you swore to the information against him, wasn't it?

A. Yes, sir.

Q. Is that right?

A. Yes, sir.

Q. Then at the time you swore to this information against Mr. Lewis you had no statement from him whatever as to whether he was a partner or not?

A. Not from him directly.

Q. Why did you go to see Mr. Lewis on November 11th?

A. I went to see if he was one of the owners; partner with Crowl Lewis.

Q. After you had sworn that he was?

A. Yes, sir.

Q. So that you swore that he was first, and then went to see him afterwards to verify it: is that right?

Objected to.

The Court: I don't think that is important.

Q. Do you know of your own knowledge how much butter fat is ice cream contained?

Objected to as not cross-examination.

The Court: They hadn't asked him anything about that.

Q. What time did you make this purchase from Mr. Crowl?

A. Some time after dinner, between one and two o'clock.

Q. And what did you do with it; took it to the hotel?

A. Placed it in my grip and took the train. Took it to the hotel and placed it in my basket and left Corry on the train that leaves are about 2:30 p. m., arriving in Erie at 3:45, about.

Q. Then what did you do?

A. Delivered it to the chemist, Prof. Evans, at his laboratory.

Q. And what time was that?

A. About 3:45 or 4 o'clock in the afternoon.

Q. You receive a salary from the State department?

Objected to.

Objection overruled.

A. I do.

Q. Are you paid by the year?

A. By the month.

Q. By the month?

A. Yes, sir.

Q. A stated salary per month?

A. Yes, sir.

Q. Did you see the can from which this product was taken?

A. I did not.

Q. Was this product in a brick form or in a loose form?

A. Loose form.

Q. Do you know whether the can from which it was taken was filled to the top or not; could you see that?



A. I did not.

Q. What condition was it in when it was placed in this jar?

A. Hard condition. Good and solid.

Q. Did you ice it?

A. I did not; I didn't need to.

By Mr. Davis:

Q. When did I understand you placed that label on the can?

A. At the time I purchased it.

Q. Where?

A. In the store of Crowl & Lewis.

The jar produced by the witness is marked Exhibit "A" for identification.

47 JAMES A. EVANS, sworn, and examined by Mr. Davis, testified as follows:

Q. Where do you reside?

A. In Erie, Pa.

Q. What is your business?

A. I am a chemist.

Q. I wish you would state from what college you graduated and what department thereof?

A. I graduated from the University of Michigan in June, 1900 from their regular course in chemistry; four year course.

Q. I wish you would state what you have been doing since that time?

A. I have been constantly engaged in analytical chemistry since that time. For the three years succeeding graduation I was at Cleveland, Ohio at the Western Reserve Medical College and connected with the Ohio Dairy Food Commission, analyzing samples of food, and then I had a sugar factory for one season, analyzing sugar products, and then came to Erie in the first months of 1904 and have been here ever since, and since the latter months of the same year, 1904, have been doing work continuously for the Pennsylvania Dairy and Food Commission of the Department of Agriculture of Pennsylvania.

48 Q. I wish you would state what experience you have had in the analysis of food products and samples?

A. I have been analyzing food samples practically for the last 11½ years; various kinds of food products that have been submitted to me.

Q. During that time what experience have you had in analyzing ice cream samples?

A. Among the samples of food that have been submitted have been samples of ice cream—quite a large number—that I have analyzed.

Q. I wish you would look at this jar and state what it is?

Exhibit "A" shown witness.

A. That is a jar that I brought here this afternoon which I re



ceived on the 21st of June, 1911, from G. M. Pelton. I received it at my laboratory in this city. It bears the record "4372, G. M. P., Crowl & Lewis, Corry, Pa., June 21, 1911, one pt. chocolate ice cream," etc.

Q. What did the jar contain at that time?

A. It contained ice cream.

Q. What did you do with the contents of that jar?

A. I analyzed it.

Q. When?

A. The same afternoon.

Q. I wish you would state to the Court and jury what you did, in the analysis of this sample?

19 A. Detail the analysis I went through?

Q. Yes.

A. I first got it in an entirely melted condition and then emptied the entire contents of the can and mixed it thoroughly by dipping it forward and back between this receptable and another until it was thoroughly and intimately mixed, homogenous throughout. Then I drew out samples into Babcock milk bottles, having weighed the bottle, and in weighing again got the weight of the amount taken, and proceeded to follow out the Babcock method for analysis with the modification as outlined by Dr. Julius Hortvet. I might say that the only difference there is in the method as I carried it out and the regular official method for the analysis of milk and cream, etc., is that ice cream has sugar added to it to sweeten it and running ice cream through by the regular official method the strong sulphuric acid chars the sugar which is there and blackens it and obscures the final reading—does not make it very exact, and the Hortvet modification is to eliminate as much as possible of that sugar before starting in on the regular official method, and that I did by adding a weak solution of sulphuric acid and separating by centrifugal force and syphoning off this weak acid which dissolves the sugar thereby eliminating the sugar, and then proceeding to the regular Babcock method and making the final readings in the regular way. I think that outlines the method.

Q. Now what was the result of your analysis?

Objected to for the reason that there has been no proper basis laid for the question, and for the further reason that it is not proper evidence; that the ice cream could and should be produced here.

Objection overruled, evidence admitted and exception sealed for defendants.

EMORY A. WALLING, P. J. [SEAL.]

A. I found it to contain less than eight per cent of butter fat.

Counsel for defendant moves to strike out the answer as not responsive to the question.

(Last question repeated).

A. I found it to contain less than eight per cent. of butter fat.

Motion withdrawn by counsel for defendant.

Q. Just how much butter fat did you find in the sample; what percentage?

Counsel for defendant objects as before, objection overruled, evidence admitted and exception sealed for defendants.

EMORY A. WALLING, P. J. [SEAL.]

51 A. I found it to contain 2.7 butter fat or fats in total.

Q. What condition was this ice cream in when you received it.

A. It was in a cold condition. It was melted around the jar but as I remember it it had a core in the middle which was still frozen.

Q. Where has that jar been since that time?

A. It has been in my locker in my laboratory.

Q. It has been in your possession since that time?

A. Yes, sir.

Q. Is that locker fastened in any way.

A. It is locked with a key which I carry in my pocket.

Q. What kind of ice cream did you find this to be?

A. It was chocolate ice cream, containing no fruit or nuts.

Q. What was the flavor of the ice cream?

A. Chocolate flavor.

Cross-examined by Mr. Carlin:

Q. What is ice cream, Mr. Evans?

A. Ice cream varies under different formulas—different recipes. It is not always the same. I take it to be, as ordinarily understood, a frozen milk or cream product, sweetened with sugar and flavored with some flavoring material.

Q. Does ice cream ever contain gelatin?

52 A. Yes, sir.

Q. Does it ever contain gum tragacanth?

A. Yes, sir, I think so.

Q. Is it ever made with condensed milk?

A. It may be that it contains at times condensed milk. I am not so ready to say that I think that would be really ice cream though.

Q. Why wouldn't it be ice cream?

A. It may be; but ice cream as I understand it, and as I think the common people understand ice cream, they expect to get fresh milk or cream frozen.

Q. What basis have you for your understanding of what the common people understand?

A. Just my general knowledge, and also the recipes and formulas which I looked over in books which give those formulas.

Q. Have you studied the formulas of ice cream in cook books?

A. I have looked through some.

Q. How far back?

A. I haven't made an extensive study of the formulas in cook books. I don't know how far back they do go, but I have seen formulas in cook books.

Q. Does ice cream ever contain corn starch?

A. Yes, probably it does.

Q. Does it ever contain arrow root?

A. Arrow root starch do you mean?

53 Q. Would this be ice cream; one pint of milk, a scant cup full of flour, one quart of cream, one cup full of sugar, two eggs and a table spoon full of flavoring extract; would that mixture, properly mixed and frozen, be ice cream?

A. I don't know as I caught all those ingredients, and I don't know as it might be ice cream. Whether it would be ice cream under the definition of eight per cent. butter fat I couldn't tell you without figuring it out.

Q. In other words, you would determine as to whether or not a product was ice cream by the per centage of butter fat that it contained?

A. I wouldn't say but that I might pass on a frozen milk product and eat it for ice cream and it contained less than eight per cent butter fat.

Q. You would call it ice cream?

A. If it was given me for ice cream I might eat it and think it was rather a poor grade—rather a thin grade of ice cream.

Q. You would think that something containing less than 8 per cent. would be a poor grade?

A. I said I might think so.

Q. Suppose that contained eggs; would it make a poor grade? The per centage might be less than eight and yet be a very rich cream, if it contained sufficient eggs.

54 Counsel for Commonwealth — to this line of examination.  
The Court: I don't see how this line is competent at this time.

Q. Did this product contain eggs?

A. I don't know.

Q. Did it contain gum tragacanth?

A. I don't know; I didn't try to find out.

Q. Did it contain any condensed milk?

A. I didn't try to find out.

Q. Was there any flour in it?

A. I don't know.

Q. So when you say this jar contained ice cream you merely say this was a product which if handed to you, you would say was ice cream?

A. Yes, sir.

Q. Now did you use the Hortvet method?

A. I used the Hortvet modification of the official Babcock method.

Q. And is that reported any place? Is it cited as an authority by any one?

A. I might say that there is no official method for ice cream analysis. There are several methods which can be used and this

55 one is in print in the bulletin of the State of Minnesota. Dr. Hortvet is the chief chemist of that state and he has worked out this method, which works well and corresponds with other methods, and I might have used some other method I presume but it would have been no more official than this one. We had to use some method.

Q. This method which Dr. Hortvet has reported in his own state bulletin, did you follow that method strictly?

A. I think so. I had all the official details.

Q. And what would you call the unofficial details?

A. The only difference that I recollect just now, I think I am clear on it, is the method of withdrawing the clear under liquor, and that is, I take it, optional so long as you don't remove any of the fat, by changing it slightly. I did it a little quicker way, that is all.

Q. Then in following the Hortvet method you modified it yourself again?

A. No, I didn't modify it in any special particular. The Hortvet modification of the official method is this: In order to remove the sugars you make a weak solution of sulphuric acid, a one to two solution—one part sulphuric acid and two of water and cool this down to 50 degrees Centigrade and then add it and mix it and whirl it and separate the fats to the top by centrifugal force. The Hortvet modification at that point says: syphoning off the underlying

56 strata of clear acid containing the sugar, and the only difference was in my modification I took a pipett- and filling the point of it with water and holding my finger firmly over the top of it inserted it through the thin strata of fats down to the bottom of the Babcock bottle and then drew out this under liquor and you could fairly say that no fat got into the pipett- and then withdrew the pipett-, washing off the outside of it so there was no fat abstracted from the bottle. I withdrew the underlying liquor in that way, instead of just exactly the detail as he says of syphoning it off. One is equally good with the other.

Q. In your opinion?

A. Yes, sir.

Q. But that is a modification of the Hortvet method?

A. It is a modification of just the shape of the glass you use. It is not a modification of the method at all.

Q. This liquid you drew off, was that clear?

A. Yes, sir.

Q. You are positive of that; this underlying liquid you drew off was clear?

A. Yes, sir, it was quite clear.

Q. When you described this method that is the way you handled this particular sample?

A. Yes, sir.

Q. When you speak of official methods, you mean official  
57 for what?

A. I refer to the Babcock method as the official method. It is the official method of the U. S. Government, the A. O. A. C.,

the Association of Official Agricultural Chemists, and it is laid down in their latest bulletin on official methods and with the exception of this preliminary step of getting rid of the liquors I followed the official method as designated by the official chemist.

Q. For what do they designate that: for ice cream?

A. No.

Q. For milk, isn't it?

A. For milk or cream.

Q. But not for ice cream?

A. No; I didn't state so.

Q. How many samples did you test: just this one test? Did you make any check determination?

A. Yes, sir, I made a check determination.

Q. One or two?

A. One other.

Q. What other methods have you compared this method with?

A. I have compared it with two other methods, neither of which are official, and I know of no official method for ice cream except the official method for milk and cream and its modification.

Q. What are the two you compared it with?

58 A. The one which I know as the Acetic Acid Hydrochloric Method.

Q. And that method, to be brief, is another centrifugal method used exactly the same as the Hortvet method except in the character of the acid which you use, is that true?

A. It is not exactly the same as that.

Q. But the principle is the same?

A. It involves the centrifugal principle. It is a method by which you use equal parts of acetic acid and hydrochloric acid and dissolve and warm up until the sugar and casein is dissolved in this acid and then by centrifugal force separate the fats into the top.

Q. That is generally known as the Chicago Board of Health method?

A. It may be.

Q. What other method did you compare it with?

A. I compared it with this method that I just outlined twice, on two different samples.

Q. But not on this particular sample in question?

A. No, not on this sample; it was two other samples. They may both have been vanilla ice cream.

Q. None of them were chocolate ice cream, were they?

A. I think not; but one of them contained gelatine. And they agreed exactly; I got the same results by both methods. Then I tried the same sample which contained gelatine and which

9 I tried these two samples on. I tried a third method on that same sample.

Q. What is the third method?

A. Designated as the Roesse Gottlieb method. It is not an official method.

Q. When did you do that: make this examination by the Gottlieb method?



A. I did it a couple of weeks ago.

Q. About two weeks ago?

A. Yes sir.

Q. Did you do that with the chocolate ice cream?

A. No.

Q. Would it make any difference whether it was chocolate or vanilla?

A. I don't think it would.

Q. Your opinion it would not?

A. Yes sir.

Q. What is chocolate?

A. Chocolate is the roasted and ground cacao bean.

Q. What is it: is it a vegetable or fruit or berry or what?

A. It is a bean. It is the seed of the cacao tree which grows in the tropics. It is one of the theobromine class I guess. I am not very much of a botanist. It grows in a pod and these seeds are taken out and roasted to develop the aroma and then they are ground.

60 Q. Was this particular product chocolate ice cream?

A. It had a chocolate flavor.

Q. How do you know that?

A. I tasted it.

Q. Could that flavor have been given to the ice cream by anything but this bean that you speak of?

A. I hardly think so.

Q. Would you say it can not?

A. I don't know of anything else that would give it a good chocolate flavor.

Q. When did you taste this?

A. The afternoon that I analyzed it.

Q. Will crude fiber dissolve in acid?

A. What kind of crude fiber?

Q. From a chocolate bean?

A. No, I don't know as it will.

Q. Does chocolate contain crude fiber?

A. I presume it contains a small per centage of crude fiber, yes.

Q. What per centage?

A. I couldn't give you the exact per centage. The chocolate bean contains about one half, as I recollect it; I don't know the exact figures, of fats, and then the other half would be of the other constituents.

Q. This crude fiber that comes from the chocolate bean will it dissolve in acid?

61 A. I don't know as it will dissolve completely in acid, but still—

Q. Will it dissolve in the one and two solution of sulphuric acid?

A. No, I shouldn't think so.

Q. Will it dissolve in straight sulphuric acid, such as you used in making this test?

A. It goes up practically. It is finely divided before it goes in.



very finely divided, and it is rather a heavy substance. If it does not dissolve it would go to the bottom of the bottle.

Q. In this final determination what was the color of your liquid that you found? There was a liquid left in the bottom of your bottle?

A. That I withdrew?

Q. Yes.

A. Yes, I stated so.

Q. What color was that?

A. Of a brownish color.

Q. Dark brown?

A. No, a light amber brown.

Q. Will the fiber go to the top or stay at the bottom of this liquid?

A. Which liquid?

62 Q. The liquid that you have left as the final result?

A. The first liquid will come to the top. The second liquid will go to the bottom.

Q. So that — the final conclusion of your test your fiber will be on the bottom, is that right?

A. I didn't see very much fiber there. In the first place there isn't very much; it doesn't take a great quantity in per centage of that chocolate to flavor an ice cream and in the second place it is very finely ground when it goes in. And in the second instance it may be distributed through the liquor. I wouldn't say. The second instance the liquor is very dark, it is not transparent. You cannot see just what is there. The strong sulphuric acid darkens it. There was no trouble in reading the fat which was on top. It wasn't in that.

Q. There was no fiber in your column?

A. No, there was not; in the fat column.

Q. You said you analyzed this product. What do you mean by that?

A. I mean I carried out the manipulation which I just outlined.

Q. Do you call that an analysis?

A. That is an analysis; that is a quantitative analysis to determine the quality of butter fat.

Q. Are the gelatine gums, if there were any in this product precipitated by this acid, the sulphuric acid?

63 A. The first one or second one?

Q. First.

A. I think so.

Q. What becomes of it?

A. They are either drawn out when the first underlying liquor is drawn off in solution, or else they are dissolved finally in the strong acid which is applied secondly.

Q. Do they carry fat with them when they are drawn off?

A. I judge not, from the fact that I tried an ice cream that contained gelatine and by three different methods and got the same result in all three.

Q. All centrifugal methods?

A. No sir.

Q. What about the Reese Gotlieb method?

A. That is not a centrifugal method.

Q. But what about it?

A. I got practically the same result with it that I did with the other two methods on a sample of gelatine ice cream.

Q. What do you do in the Reese Gotlieb method to get rid of the gelatine in ice cream: anything?

A. No, you don't.

Q. Did you do anything else with this product beside make this test as to the butter fat?

A. I made analysis to determine the presence or absence of  
64 preservatives.

Q. Anything else?

A. I think not, except as I already stated I tasted it and noted its appearance.

Q. That is, you tasted it and looked at it, but outside of that in this test for preservatives and test for butter fat did you make any test whatever?

A. Well, to detect the presence of fruits or nuts. I tasted it carefully and tasted no fruit, which you can do in a fruit ice cream or nut ice cream. And beside that, you can see the fruit and the nuts usually in the cream itself when it is melted. They settle to the bottom, and also in the Babcock bottle after the acid has been added and the spinning has been done.

Q. When was your attention first directed to this question of the fruit and nuts in this ice cream: when did you make that test: the same day?

A. The same time I made all of them.

Q. What experience have you had in testing fruit by its taste for the presence of fruit or nuts?

A. What experience have I had in testing ice cream? I tested quite a number of samples where I knew the fruit was there and where I could see it.

Q. Do you mean to say when the nuts were ground up and in that ice cream you could see them when it was flavored  
65 with chocolate.

A. I made the other additional statement with the clear acid you would be able to see any particles of nuts there if they were there ground by any machine.

Q. What clear acid: your first test or second?

A. Both of them; I didn't see any in either.

Q. Wasn't your second one a brown liquid?

A. That is true, it is in the bottom of the bottle, but at the time after the second addition of water it is quite clear.

Q. Yet in this one that you are able to say there were no nuts you say you couldn't see whether there was any fiber floating in or not?

A. I didn't quite catch that.

Q. I understood you to say in this second reading whether there was any fiber floating or not because it was of a dark brown color.

and yet you now say you could have seen if there had been ground nuts floating in it?

A. In the case of the nut ice cream you can feel the nuts between your teeth when they are in there.

Q. Will you answer my question. Do you mean to now say that though you could not see fiber floating in this brown liquid that you could have seen ground nuts?

A. If you could see one in the same liquid I was referring to then you could see the other, or at least you could see nuts if you couldn't see the fiber.

36 Q. You could see ground nuts but couldn't see the fiber.

A. I think so, but in the bottom of the main part of the bottle the liquid is quite dark and fiber is a minutely divided substance, would be if it were not dissolved altogether. I didn't say there was any fiber there or wasn't there; I didn't see any, and it may have been dissolved in this strong acid and not there at all. At most it would be there in suspension, in a very fine state of subdivision, much finer than the ordinary grinding of nuts would make nuts, but after the second addition of water and the thing is filled up into the neck the top portion is quite clear and you can see through it and there were no nuts in that portion of it at least.

Q. Were there any nuts in the other portion of it?

A. I don't think there were.

Q. Would you say the acid would dissolve the fiber?

A. Well it is pretty close to that because it is so finely divided. I wouldn't want to say it was absolutely in solution. The proper thing to dissolve fiber is strong alkalis.

Q. Have you ever tried that to see whether it did or not?

A. What?

Q. Whether that sulphuric acid would dissolve fiber?

A. I know the thing to dissolve fiber is caustic alkalis.

37 Q. Would the sulphuric acid dissolve it in your opinion?

A. I don't know that it would, but it amounts to about the same thing as far as the eye is concerned because it is so finely divided.

Q. Are you positive chocolate will dissolve?

A. Yes sir.

Q. Positive?

A. Yes, sir.

Q. Now if this acid would dissolve fiber why wouldn't it dissolve the nuts?

A. I didn't say that it did dissolve it, but I say there is this difference, that the fiber is so finely divided that it is quite different to the eye than ground nuts and in the mouth you can feel the ground nuts, even if they are ground. A sandy feeling.

Q. How do you determine crude fiber in food products?

A. I don't know as I can give you off hand all the details.

Q. Just the general principle of how it is done?

A. I guess I stated that I thought the alkali was the thing to dissolve it. In the determination of crude fiber you eliminate all the other substance and weigh back the fiber. You wash them

thoroughly with strong acid and then wash them with strong alkali and then weigh back the crude fiber. The crude alkali does not dissolve it; you use it for a wash instead of for a dissolvent.

68 Q. If you weigh what is left then the fiber does not dissolve?

A. That is what I said.

Q. So that does not dissolve fiber?

A. No, that is what I say.

Q. It dissolves everything but the fiber?

A. Yes sir; you use that for a wash.

Q. How is fiber finely divided? You spoke about it being finely divided?

A. In the first place it is mixed entirely through a vegetable substance usually.

Q. Isn't it ground; isn't the chocolate ground?

A. Yes sir, and it is ground up with it.

Q. And the nuts are ground with it?

A. Yes sir, but not so fine as the chocolate.

Q. How fine are nuts ground?

A. I suppose that varies.

Q. Doesn't it vary with different manufacturers?

A. I presume.

Q. And the amount of nuts used would vary?

A. I suppose so.

Q. Isn't it a fact that many ice creams are made with flavors and also with nuts?

A. I suppose that is possible.

69 Q. What were the temperature of these Babcock bottles when you finished your test?

A. I didn't determine the temperature exactly.

Q. Can you state how much it was?

A. I determined the temperature of some run in the same way recently.

Q. I am asking about this particular sample: did you determine in this test?

A. No, not exactly. I determined it with my hand. I run it according to the directions.

Q. In answer to the question before the magistrate: "What was the temperature at the close of this test," didn't you say it was about 85?

A. No, I don't think I did. I don't know whether I said it in this case or not, but I have said it in regard to this method, that it was approximately 80, as determined simply by the grasp of the hand, but I have since made some actual determinations of the temperature, running it as I always do in my customary way and I find the ones that I determined ran from about 150 to 160.

Q. That is the recent ones that you ran?

A. Yes sir.

Q. Not this one?

A. No sir.

Q. Didn't you say in answer to this question: What was the temperature at the close of the test"?, your answer, about 85?

A. No, about 80.

Q. You are positive you didn't say 85?

A. Yes sir.

Q. What test did you make as to the temperature?

A. I didn't make any except the test of the hand and I said 80. I know why I said 80, because I am somewhat familiar with the temperature 80. We use that temperature quite a bit in the laboratory and I judge it was about that temperature. I don't say it was exactly that temperature.

Q. Would the temperature make any difference.

A. The temperature within certain limits doesn't make any appreciable difference that you can notice with the naked eye.

Q. When you speak of 80 you are speaking of Centigrade.

A. Yes sir. But of course as temperature runs up any substance expands. Water will be more. Fats will expand still more, so at a higher temperature the fats would reach a larger volume and larger per centage than at a lower temperature.

Q. Did you give these bottles a hot water bath when you finished your test?

A. No.

Q. What method does the government use in testing ice cream?

A. I don't know. They have no official method.

Q. Does it make any difference what part of a can a sample of ice cream is taken from?

A. If it has not been melted it does not.

Q. Assuming just an ordinary can of ice cream standing in a confectionery store, would it make any difference as to what part the sample sold was taken from?

A. As I say, if it has not been melted the ice cream is mixed all the time that it is being frozen, in order to keep it smooth and not granular and that keep the milk and cream intimately mixed while it is being frozen and the final product is quite uniform throughout.

Q. Quite uniform?

A. Yes sir.

Q. How do you know that?

A. It would have to be.

Q. Well, how do you know it?

A. I know it being tried for one reason and taken from different parts of the can at different stratas and they analyzed that.

Q. You did that?

A. No, I didn't.

Q. You have read that other people did?

A. I know of a man who did it, yes sir.

Q. Did you ever read of the experiments made in that direction by Dr. William A. Wyman of Covington, Ky.?

A. No.

Q. He said in that that his first sample—

Objected to.

The Court: As to anything that throws light upon his analysis



you have a right to examine, but not anything that is competent as a matter of defense. You cannot open your case by cross-examination of a witness. I do not think you can read out of a book or pamphlet in the cross-examination of a witness.

Q. Would you say that it would be possible from the same can, taking a sample at the edge, another at the center and another at the lowest strata, to get three different samples that would vary as much as seven or eight points, if it was a five gallon can?

Objected to as not cross-examination.

The Court: I don't believe that is cross-examination. It may be competent in rebuttal to show that, but I do not think it is cross-examination.

Objection sustained and exception sealed for defendants.

EMORY A. WALLING, P. J. [SEAL.]

Q. Isn't it a fact that the more recent authorities have abandoned centrifugal methods for testing ice cream?

A. I don't know that there has ever been an official method for testing ice cream.

73 Q. More recent. Haven't they abandoned centrifugal as being unsatisfactory?

A. It is pretty difficult to find any authorities with any methods for testing ice cream at any stage of the game.

Q. There are other methods beside those you have described?

A. I don't know that I know of any other that is laid down specifically for testing ice cream.

Q. Leach is an authority on food work?

A. Yes sir, I think so.

Q. His recent work abandons and states as one of the main changes made—

The Court: I don't believe you can cross-examine him about the contents of a book. If Leach so states and it is competent evidence you can offer Leach when the proper time comes, but I don't think you can cross-examine Mr. Evans about what Leach says.

Exception sealed for defendants.

EMORY A. WALLING, P. J. [SEAL.]

Q. Did any authority ever recommend a centrifugal method for chocolate ice cream?

A. I don't know. It is pretty hard to find any authority that recommends any method for any kind of ice cream. They have been pretty slow on doing it. We have had to get the methods and work them out ourselves pretty much.

74 Q. In fact it is recognized rather a difficult matter to test ice cream?

A. Well, I have worked on three methods and got them all to agree on the same sample. I think that ought to be pretty safe.

Q. But not on this sample?

A. More than that, I made the ice cream in the first place and knew how much fat it contained and they corresponded with what I put in it.



Q. And how did you find them: how did you know how much they contained?

A. I measured the quantities I put into it.

Q. Measured?

A. Yes sir.

Q. Didn't weigh?

A. Yes sir, weighed them.

Q. And then worked out your percentage from the weight of the various materials?

A. Yes sir. I don't want to be misunderstood that I did that too exactly. I said they corresponded rather closely with what I put in it. I mean to say this: my scales were not as delicate as they might have been for weighing those original substances, but I made the ice cream and put some gelatine in with it and I made approximately a nine per cent. ice cream, having analyzed the cream

75 I put in it and I got by these methods 8.8 per cent., which is pretty close to what I put in; but even the Roese Gotlieb method, which is not a centrifugal method, did not develop the full nine per cent; in fact, it was a little less than the centrifugal methods.

Q. Did you freeze this product, or did you just make the mixture?

A. I froze it.

Q. In a regular freezer?

A. Yes sir.

Q. Was this a chocolate ice cream?

A. No, it was not.

Q. So you have never made that test you speak of on a chocolate ice cream?

A. No, I did not on a chocolate ice cream.

Q. Are you a regular employe of the State department?

A. I have been doing work for them for the last seven years.

Q. You are paid by the analysis you make?

A. Yes sir.

Q. And how much do you receive for the determination of ice cream?

Objected to.

Objection overruled.

A. I have no objection to telling. I am very willing to say that I get the same amount, whether the case developes into a case or whether it does not. I am very willing to state the exact

76 sum, if you desire me to, as far as I am concerned. I get three dollars a sample, whether it developes into a case or whether it does not.

Q. And are you paid for your attendance at court?

A. Yes sir.

Q. Do you travel around with the inspectors to various places?

A. I go to court when I am subpoenaed to go with the inspectors.

Q. Don't you travel around with the inspectors and set up your laboratory in various towns and make the analysis for them right there after they take the sample?

A. Yes sir, we do that in the summer time—perishable samples of milk and cream, and we have done it somewhat with ice cream.

Q. Who pays your expenses on those trips?

A. I pay them myself.

Q. How long did you take to make that analysis?

A. For the determination of the butter fat?

Q. Yes.

A. It takes about three quarters of an hour to go through it once, and then I went through it again.

Redirect by Mr. Davis:

Q. I wish you would state what you mean by "quantative analysis?"

77 A. Analysis are divided into two classes; qualitative analysis and quantitative analysis. A determination to determine the quantity of any given ingredient in any substance is known as a quantitative analysis for that purpose.

Q. In this particular case what was your analysis for?

A. In the case of the fat it was to determine the quantity of fat. In the case of the preservatives it was a qualitative analysis.

Q. And what qualitative analysis did you make?

A. Just as I stated: in the case of the preservatives those were qualitative analysis.

Q. Is that a complete analysis of the sample of all its ingredients?

A. It is not a complete analysis of the material in all its constituent parts, but it is a complete analysis to determine the quantity of that one constituent.

Q. And in this case your analysis was sufficient to determine what?

Objected to.

The Court: I think an expert may testify whether he made a complete analysis.

A. I made a complete analysis to determine the quantity of butter fat. I didn't make a complete analysis to determine the quantity of all the ingredients in the sample.

Q. What evidence of fruit or nuts did you find in this sample?

A. I didn't find any.

78 F. T. ASHMAN, sworn, and examined by Mr. Davis, testified as follows:

Q. Where do you reside?

A. I live in Beaver, Pa., having my office and laboratory in Pittsburg.

Q. With what college are you connected?

A. I am Professor of chemistry at the University of Pittsburg.

Q. How long have you occupied that position?

A. Twenty years or more.

Q. How long have you been an analytical chemist?

A. I graduated at Columbia University from a four year course

in the year 1881; that is a little over thirty years ago, and I practiced my profession since that time.

Q. During that time what experience have you had in the analyzing of food samples?

A. It has been quite large. I might say that for twenty years or more I have been chemist for the department of agriculture in this state in connection with the dairy and food department, and for one year too I was chemist to the department of agriculture of the United States, doing similar work for the United States, until they established their own laboratory in Pittsburg.

Q. What experience have you had in the analyzing of ice cream samples?

79 A. It has been quite varied. I have analyzed numbers of ice cream — that have been brought in to me for examination and some home made ice creams.

Q. What experience have you had in the analyzing of cream and milk samples?

A. That has been very extensive. I have analyzed thousands of samples of milk and cream.

Q. I wish you would state if you heard the testimony of Mr. Evans?

A. Yes sir.

Q. You heard the testimony of his analysis of the sample in this case?

A. Yes sir.

Q. I wish you would state whether or not the method that he explained as having used in this case is an approved method?

A. I would say it was a proper method. One of the recognized methods.

Q. I wish you would state if you have used that method yourself?

A. I have tried the method out and found it all right. I have tried it in connection with other methods and in an experimental way with what I call a positive method. If you like I will explain.

Q. Yes.

80 A. In order to test up the different Babcock methods I made an experiment recently. I took some commercial ice cream. It was three different kinds; what we call ice cream brick, both vanilla, chocolate and strawberry and tested part of it with two Babcock methods and also a part of it by using a modification of the cheese method, that is whereby we determine the fatty cheese; mixed it with dry copper sulphate and then extracted them with ether. I found that they agreed quite closely. In fact what I would call the positive method gave me a somewhat lower result than the Babcock method did. The Babcock methods went about 7.9, while the other method gave me 7.2 butter fat, so that and from various other experiments I have made and in the long practice I have had I would consider the Babcock method perfectly reliable for the ordinary testing of ice cream.

Q. You heard the description of this sample, did you not?

A. Yes sir.

Q. From the description of the sample and also from the descrip-

tion by Prof. Evans of the method he pursued in analyzing for butter fats, what would be your opinion as to whether or not he could arrive at the proper amount of butter fats in that sample?

81 Objected to for the reason that whether he could or could not arrive at it is of no importance; the question being as to what he did, and he has already testified to what he did; and that the question is irrelevant and incompetent.

The Court, to Mr. Davis: What description have you reference to?

Mr. Davis: The description of the analysis given here in court.

The Court: Basing your testimony upon the description given by Mr. Evans here in court to-day. The objection is overruled, evidence admitted and exception sealed.

EMORY A. WALLING, P. J. [SEAL.]

A. I would say that this was a sample of chocolate ice cream containing the percentage of butter fat that he states, judging from his testimony.

Counsel for defendants moves to strike out the answer, as not responsive to the question.

The Court: I don't think the answer is quite responsive to the question.

(Question repeated.)

A. I would say yes sir. I have said that in the beginning.

By Mr. Davis:

82 Q. From the description he gave in court here of the method he pursued in this analysis, what would be your opinion as to the degree of care that he used?

Objected to.

Question withdrawn.

Q. From the description given by Mr. Evans of his method of arriving at a decision as to whether there were any fruit or nuts contained in this sample, what would be your opinion as to his being able to determine that question?

Objected to.

The Court: I think we will permit you to ask him if he heard the testimony of Mr. Evans; whether the method Mr. Evans used in determining whether or not there was fruit or nuts in the sample was a proper method. I believe it is competent for one expert to testify as to whether or not the method used by another expert is competent.

Mr. Kincaid: Our reason for objecting to this is Mr. Evans stated the way he determined the amount of nuts and fruit in that was from his eyesight and taste. He could not determine whether the method was good or not unless he knew whether his eyesight and taste were good. We object to it; it is not a competent question put to an expert.

83 By Mr. Davis:

Q. You heard the testimony of Mr. Evans on the point of determining whether there were fruit or nuts in the sample?

A. Yes sir.

Q. State whether or not the method pursued by him was a proper method?

A. I would say it was.

Objected to, objection overruled, evidence admitted and exception sealed for defendants.

EMORY A. WALLING, P. J. [SEAL.]

Cross-examined by Mr. Carlin:

Q. I understood you to say this was the recognized method?

A. I said it was one of the recognized methods.

Q. Who is it recognized by?

The Court: What method?

Mr. Carlin: The method used by Mr. Evans.

The Court: In determining the amount of butter fats?

Mr. Carlin: In determining the amount of butter fat.

A. The method that he used is the Hortvet method, which is a modified Babcock method.

4 Q. Who is this method recognized by, beside Mr. Hortvet?

A. Hortvet published his method originally in one of the bulletins, if I remember, issued by the State of Minnesota, and it has been quite largely used by different chemists. I know I have used it and I heard Dr. Freer of State College speak of it as being proper method, and also Lewall of Philadelphia, who are recognized authorities and among the fraternity generally.

Q. The men you have mentioned are all employes of the Pennsylvania State Department, isn't that true?

A. Dr. Freer, well he is also U. S. chemist, and I may say I was talking not long ago to Mr. Albrecht, of the U. S. laboratory in Pittsburg, who recognized the method as one of the recognized methods. He is U. S. chemist there.

Q. This Minnesota bulletin, Mr. Hortvet is the chemist there?

A. He is the chemist for the state.

Q. Beside being published in his own bulletin has it ever been recognized by any other authority on food?

A. I couldn't say whether it has been copied anywhere else or not.

Q. When did you have this conversation with Mr. McKnight?

A. Albrecht his name it. During the past week I was discussing with him the methods for making ice cream analysis.

5 Q. At that time you knew you were coming here as a witness?

A. Yes sir. I was naturally interested. That was the time too made these experiments I spoke of.

Q. How do you account for the fact that an abstraction method gave you a low fat result as compared with the centrifugal method?

A. I couldn't tell you just why. I imagine the fat obtained by



ether is purer. I think all of the methods are not as perfect as the ether method. The ether extracts the fat in a greater purity than any other method.

Q. It is the most exact method?

A. I would say so, as far as my experience goes.

Q. Would you say that looking at a sample and tasting it is a proper method for testing whether there are fruits and nuts in it?

A. I would say it would be a proper method for determining certain qualities of it; not all of the qualities but certain qualities.

Q. Would that determine to your satisfaction as to whether or not there were fruit or nuts in a product, just to look at it and taste it?

A. It would depend upon what kind of fruit it was or what I was looking for. If the samples submitted to me were strawberry ice cream, I would want to possibly get some of the bits of strawberry and examine them under the microscope, but in other cases  
86 by my taste or by matter of smell I would be pretty well satisfied that for instance it would be of a certain kind: say chocolate.

Q. Suppose we take a nut ice cream: can you take a nut ice cream that has also been flavored with a flavor such as chocolate and state by looking at it and tasting it whether it contains nuts or not?

A. I would by tasting it; I think I could taste the flavor of nuts and also in biting into the nut. In chewing the thing I would find whether or not it contained nuts.

Q. What is the specific gravity of butter fat?

A. Which fat?

Q. The fat that you get in this determination of ice cream: the butter fat.

A. I couldn't give you the exact specific gravity. It runs something like 0-decimal 87 and 92 or 93.

Q. What of the chocolate fiber which would be in chocolate ice cream: its specific gravity?

A. It would be somewhat heavier than water, depending somewhat again whether it had been compressed in the making of it or whether it had been pulled apart, etc. Of course the specific gravity would be greater than water. I could not give you the exact specific gravity.

Q. Would not this fiber float on this acid in this determination?

87 A. I think it would possibly largely float when the acid is first put in, but afterwards we fill up with water before we run the fat up into the neck and my experience is that practically all of the fiber remains in the lower part of the bottle. It does not come up into the neck.

Q. That was your experience?

A. That is my experience.

Q. And the fiber does not dissolve in the acid?

A. To some extent; not altogether.

Q. To what extent?

A. You must remember that the fiber of the cocoanut, chocolate



s not a pure fiber, and the portion of it that is starch, that is fat and gummy substances, etc. is dissolved, while the pure fiber itself is well developed—that is, I mean if the nut has been full grown, is not completely dissolved, so that when I say the fiber—you mean of course the substance of the nut—I say it is partially dissolved and partially not.

Q. We are talking about chocolate: will the fiber of this chocolate float on this acid?

Counsel for the Commonwealth ask the purpose of this question: if it is for the purpose of testing the chemical knowledge of the witness it may be competent.

88 The Court: I think it is competent as testing the chemical knowledge of the witness and as bearing upon the probable accuracy of the chemical analysis of Prof. Evans.

A. It would depend quite largely upon the physical condition of that fiber. You take some substance, like feathers, which are really heavier than water, will float in the air, and in the same way I could not answer this question as to whether or not this fiber would float on the acid or go to the bottom of the bottle, unless I saw some of it. It depends largely upon its physical condition. If it were fluffy and torn apart it might float on the acid, but if it were dense it would likely go to the bottom.

Q. Did you examine chocolate ice cream by the Hortvet method?  
A. I have.

Q. How did the fiber behave in that case?

A. The fiber as a rule, as I stated a while ago, would remain in the body of the bottle, while possibly a few threads might have mounted into the neck. They are easily separated and by properly whirling and keeping the bottle hot you can keep them separate.

Q. If the bottle was not kept hot they would not separate?

89 A. It would be at the bottom of the fat column. It is possible the fat column itself, the edge of it might not be just exactly very sharp, but you keep the bottle warm and most of the fiber would still remain. A few threads might possibly mount into the neck.

Q. That would cloud your reading?

A. Not if you are careful; if you turn the bottle around and measure it, as I always do, with a pair of dividers, and carefully; it depends upon the care taken.

Q. If the line is not sharp would dividers help you?

A. It is sharp in some parts of it, or it ought to be. It is always sharp in some parts.

Q. When you say you use the Hortvet method, you use the Hortvet method as used by Mr. Evans, or as laid down by Hortvet: which?

A. The method I use I use it in comparison with others. I will say that I personally use the hydrochloric acid method. I copied the method directly from Mr. Hortvet's and then used Mr. Evans' modification of it, both. I saw Mr. Evans here on another case two

or three months ago and he gave me his method at that time and I tried it out.

Q. Then you would say as a general thing this fiber does float around the top and sometimes comes up into the neck of the bottle?

A. No, I didn't say that. I said some small particles of  
90 the fiber might come to the top, but most of it remains in the bulk of the bottle.

Q. Yes, but on top of the acid?

A. Not all of it.

Q. Some of it?

A. Possibly, as I stated, depending upon its condition.

Q. It does not dissolve, does it?

A. To some extent it will dissolve; that is, the contents. The fiber itself, the actual vegetable fiber, is not dissolved to any great extent.

Q. Does it all dissolve so that you get a clear solution?

A. Yes sir, I think by experience you don't have any trouble in the matter.

(Question repeated.)

A. In the samples I tested; of course I didn't analyze Mr. Evans' samples. Yes.

Q. It did?

A. Yes sir, so that I got a clear solution; so I could read my fat with perfect satisfaction and compare with other methods.

Q. And all the fiber had dissolved from the body of the bottle?

A. Not all had dissolved.

Q. There was some there?

A. There was some in what you might call the body of the bottle.

91 Q. There was some small particles of fiber in the neck of the bottle?

A. Some few occasionally, but not always. Sometimes would not be there.

Q. The balance was in the body of the bottle?

A. Yes sir.

Q. Was it on top of the acid or bottom?

A. Some on top and some bottom.

Q. It wasn't all on the bottom?

A. No sir, nor all on top.

Q. When you speak of the body of the bottle you refer to the larger portion?

A. Yes sir.

Q. Some was in the bottom in the acid?

A. Yes sir.

Q. And some on top?

A. Yes sir.

Q. And some in the neck of the bottle?

A. A few fibers would go up.

Q. Do the fibers carry fat?

A. Not if the operation is properly carried out, no.

Q. You are positive of that?

A. That is my experience.

Q. Did you ever take any of the fiber out and make an extraction from it, to see whether it carried fat or not?

92 A. I couldn't say that I did.

Counsel for Commonwealth offers in evidence the jar produced and label thereon, marked Exhibit A.

Commonwealth Rests.

Counsel for Defendant moves to dismiss as to Mr. Lewis, on the ground that there is nothing to connect him with this case whatsoever, he not being a principal who made the sale and not being either an agent or employe covered by the statute. It having been testified that he was not present when the sale was made, and so far as the testimony shows there being nothing to connect him with; and also as to Mr. Lewis and Mr. Crowl both, on the ground that there is no proof in this case that the substance sold was ice cream, as charged in the indictment. The expert on the stand testifying for the Commonwealth positively refusing to state that it was ice cream; and further, that there is absolutely no proof before the Court that it was chocolate ice cream or that it did not contain fruit or nuts.

93 The Court: I don't know about the case against Mr. Lewis. Mr. Lewis seems to have been a partner; at least there is some evidence tending to show that he and Mr. Crowl were partners. I think we will proceed with the case; we can decide that question at the conclusion. Really, so far as the Court can see, it does not make any material difference. There are some cases where the Court perhaps would direct a verdict. I don't see in this case how the defendant Crowl could — prejudiced by allowing both defendants to remain charged for the present. We will see what the evidence shows.

Dr. JOSEPH A. DEGHUE, sworn, and examined by Mr. Carlin, testified as follows:

Q. What is your profession?

A. I am an analytical and consulting chemist, engaged at present in practice at the Lederle Laboratories in New York City.

Q. Are you a graduate of any college or university?

A. I am a graduate of Columbia University, where I studied chemistry, taking the usual four years' course, and after graduation I took a post graduate course, also in chemistry, taking the

94 degree of Master of Arts and doctor of Philosophy.

Q. Did you afterwards do work in chemistry?

A. I have been practicing chemistry for 21 years. I graduated in 1890. After graduation I became the assistant of Prof. Chandler, the professor of chemistry at Columbia University, and assisted him in the teaching of physiological chemistry at the college of physicians and surgeons, which is the medical department of Columbia. In 1896 I became chemist to the New York City department of Health. The work of the chemist of the department of health is very similar to the work of the state food chemist, covering the examination of

food on sale in the city of New York. Since 1904 I have been with the Lederle Laboratories as director of the department of chemistry.

Q. In your work as director of the department of chemistry do you analyze food samples?

A. Constantly.

Q. Ice cream samples?

A. Constantly.

Q. Have you analyzed several hundred samples of ice cream?

A. Several hundred, and with the aid of my assistant I have probably analyzed several thousand.

Q. Are you familiar with the various methods of analyzing ice cream?

A. I am.

Q. Are you familiar with the Hortvet method?

A. I am.

Q. Is the Hortvet method a recognized method?

A. Well, I shouldn't call it a recognized method in the sense that it is a method which is commonly described in the books and publications generally on food chemistry and the analysis of ice cream. The only place that the Hortvet method is described is in the report of the chemist of the state of Minnesota, and Mr. Hortvet, or Dr. Hortvet I believe, he is, is the chemist of the state of Minnesota and he described this method as one which he used in his testing.

Q. Have you made analysis of chocolate ice cream?

A. I have; a considerable number of analysis of chocolate ice cream.

Q. Have you compared this method with certain other methods?

A. I have. I conducted an investigation, making the determinations of the fat by different methods on the same sample of ice cream—in this case chocolate ice cream. I have used, to the best of my recollection, about half a dozen different methods on the same sample, in order to compare them and see how the results compared.

Q. Was one of those methods used the method which you have heard described, the method used by Evans?

A. It was. I have used both the Hortvet method, properly speaking, that is the method as described by Dr. Hortvet in his report, and the method as was described in my hearing by Mr. Evans. They differ in some degree.

Q. In any essential particular?

A. Yes, sir, I should say in a very essential particular.

Q. And what is that?

A. That is in the method of drawing off the diluted acid in the first step in the process. The method as described is to weigh out a certain amount of ice cream into a bottle, such as was shown here in a bottle of this kind. The melted ice cream is weighed out into such a bottle. Then a dilute sulphuric acid is poured on that ice cream, an acid which is diluted two parts of one to one of acid. That is shaken up, the object being to dissolve out the sugar in the ice cream and leave the curd of the milk and cream; will get in the form of a cheese—will lie there a cheesy mass. That curd also holds

the fat. The bottle, after the addition of this acid, is put into a so-called Babcock machine, which is simply a centrifugal machine that can be whirled at a rapid rate, and containing cups. These bottles fit into cups, so that when the machine is whirling the bottles

lie there flat and the lighter portions of the liquor, in this case the curd and fat, come to the top, and when the machine stops the bottle settles down gently into an upright

position and the fat and curd are floating on this liquid. Now, according to Mr. Evans' description he has taken a pipette, which is simply a straight glass tube with a blow-pipe in the center of it and drawn to a point at the end, and he put a little water in the end of the stem of the pipette, the lower end of the stem, and plunged that through the fat and curd floating on this liquid and drew off what he called the clear liquid lying below. There is just where he differs from the method described by Dr. Hortvet. In doing that naturally in plunging a pipette through a layer of curd and fat there is some agitation of that—throws some down into the liquid, and there is great danger in drawing that up by entering at the end of the pipette. That is, the way the liquid is drawn up—in drawing up some of that fat and curd into the pipette. Now Hortvet tries to avoid that very difficulty by using a tube fitted into this bottle, which is fitted in through a stopper in the end of the bottle, a narrow glass tube which runs to the bottom of the bottle and curved over, so that it can be used as a suction pipe afterwards. He puts that in before he whirls the bottle, so that when he whirls it the fat and curd come to the top above the end of the tube and

he does not have to plunge the tube through the layer of curd and fat. Then after the bottle comes to a rest he attaches a suction to that, either with his mouth and rubber tube or syphons it over, starts it and draws it over, syphons that over and draws off that liquid. Then he puts in some water, puts back his tube and repeats that operation, in order to wash his curd and fat. In that way he avoids that one difficulty of the method of plunging the tube through the fat layer. I would call that a very essential change in the method.

Q. Until you heard Mr. Evans testify as to his method, had you ever heard of that method that he described, that modification ever being used by any chemist?

A. I never have.

Q. Is the Hortvet method a generally recognized method among chemists as a proper method of testing ice cream?

Objected to as leading.

The Court: I think it is leading.

Q. In your opinion would you say it was an accurate and correct method?

Objected to.

The Court: Put the question in such a way that he cannot answer yes or no, and let him state.

Q. What would you say in comparing the method used by Mr.



99 Evans, his modification of the Hortvet method, with other methods, as to its accuracy?

A. It is not an accurate method when applied to ice cream. I might say that all these centrifugal methods, even the so-called modified centrifugal methods, are originally designed for condensed milks—sweetened condensed milks—the object being to wash out the sugar, as I have already stated and as Mr. Evans stated. Where the mixture is nothing but milk and sugar the methods work very well, they give accurate results; but in a product like ice cream they do not give accurate results. The fact that these methods do not give accurate results is very generally recognized not only by chemists with whom I have discussed the subject, but find it generally stated so in the authorities.

Q. Have you made personal experiments?

A. I have, a considerable number of them.

Q. Using the same sample?

A. Yes, sir.

Q. Can you give us any of those results?

A. Yes, sir. In general there are two classes of methods for determining fat; the centrifugal method, of which the so-called Hortvet is one, based on the principle of whirling out the fat as I have already described, the final result being a column of fat in the neck of the bottle just as this. That depends on the centrifugal force of the machine whirling out the light fat to the top of the heavier column of liquid.

100 The other class of methods depend on dissolving out the fat by means of a suitable solvent, just as you dissolve sugar in water. Fat will dissolve in sulphuric acid, for instance. Those are called the extraction methods. They depend upon an entirely different principle from the centrifugal methods. Now I have compared several centrifugal methods with several extraction methods, working on the same sample of ice cream. The centrifugal methods invariably give low results, for various reasons. The extraction methods give correct results, provided the extraction is carried on long enough. In some materials, such as ice cream, it is necessary to carry on the extraction with these solvents a much longer time than it is in the case of an ordinary milk or a condensed milk; some product which is not as complex as ice cream. My results varied with the different kinds of ice cream, as different flavors have an effect on the taste. Chocolate ice creams are particularly difficult to handle by centrifugal method and they give very low results, results which are absolutely worthless so far as showing any true percentage of fat in the ice cream. This is due to the fact that chocolate contains a cellular material very much like the fiber of wood. Chocolate is a natural vegetable product, the so-called chocolate bean.

101 It has a structure. It is made up with cells in which the other ingredients of the bean are contained. Now these cells are composed of the same material which goes to make up wood and contain this cellulose. The chemist commonly calls this material crude fiber. That is a general term which covers this material in most food products. Most natural food products like



chocolate or cereals contain this crude fiber. This crude fiber will not dissolve in strong acid, consequently it goes with the curd. In a chocolate ice cream, where there is a material amount of this crude fiber, this crude fiber will go with a curd in the fat in the first precipitation. It is left behind when the material is washed with water and finally when the material is treated with strong acid it still remains there as a solid material. Now the idea of the Babcock method is this: that in taking a milk, a condensed milk or cream, that milk or cream is treated with an acid which is strong enough to dissolve everything but the fat and make a clear solution there of everything with the fat floating around in it. Then this bottle is put into the centrifugus and whirled and finally filled up with water and again whirled until there is a clear column of fat in the neck of this bottle. Now the whole accuracy of this test depends on the fact that the material therein but the fat is dissolved. If any solid material remains there undissolved that affects the test in two ways; in the first place some of it, as has been described here, comes up into the fat column, it works up a certain distance into the fat column, making it absolutely impossible to get any clear, sharp lower edge of that fat column. Now these bottles are graduated to read percentages of fat when a certain amount of material, eighteen grams of material, are taken for the test and each little division there represents two tenths of one per cent. It is a little division which is about one sixteenth of an inch. Now unless that lower edge of the fat column is very sharp it is impossible to read that within several of those divisions and affects the test in that way. But the test is affected more seriously in a second way, having the solid floating material in the liquid. That solid floating material, especially a material like this crude fiber, which swells up and becomes slimy when treated by this strong acid, it holds the fat bound up in the fiber itself and clinging to it and prevents the fat from coming up into that fat column. Now I have tested that out, not only by noticing that I didn't get all the fat in the neck of the bottle, but I have drawn off the upper fat column after whirling out the fat in the ordinary method, drawing that off and washed all of the fat out of the neck of the bottle and then filtered out, put that liquid through a filter, so as to get all the solid material that was floating in the acid and washing that with water so as to wash out all the acid and then put that in an extraction apparatus, which is an apparatus arranged so that the material in the apparatus can be abstracted with the solvent ether, which extracts fat, and obtain a considerable amount, in case of chocolate ice cream as much as three per cent. figured on the original material. Three per cent. of fat which had been held back in the solid material. Now the general result of my tests with this I found that the extraction methods, in one case chocolate ice cream, showed within a few hundredths of  $7\frac{1}{2}$  per cent. of fat, in the chocolate ice cream. The centrifugal methods and the Hortvet method would show—well they were not uniform at all; they would vary from  $1\frac{1}{2}$  to 3 per cent. on that same sample of ice cream.

Q. Have you made any tests as to samples taken from various portions of the can of ice cream?

A. I have.

Q. What would you say, taking a five gallon can, as to the variation of the top of the can with the bottom; how high would it be in percentage on fat?

104      Objected to as immaterial; the evidence upon the part of the Commonwealth shows the sale of this pint of ice cream that it is not material to show what there might have been in some other part of the can or in some other part of the store.

The Court: In our opinion the only evidence the Commonwealth having offered being in regard to the half pint bought by Mr. Horton, it is not material to show that any different parts of a large can of ice cream would show a greater amount of butter fat than others. It is a question as to the sample or as to the amount shown by the defendants or one of the defendants to the prosecutor. The objection is sustained, evidence excluded and an exception sealed for the defendants.

EMORY A. WALLING, P. J. [SEAL.]

Adjourned until morning.

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*Proceedings of November 16, 1911.*

JOSEPH A. DEGHUEE, recalled by Mr. Carlin:

Q. In your opinion as a chemist is it possible to preserve ice cream for several months, so that it could be produced here before the jury?

A. It is.

Q. Could that ice cream if produced here have been retested as to show the percentage that it contained of butter fat?

Objected to.

A. It could.

Q. Now doctor, will you explain to the jury the necessity for use of these acids in these so-called modified Babcock tests when they are used in testing sweetened and condensed milk?

Objected to.

The Court: Unless you propose to show the ice cream in question was made from condensed milk I don't see the importance of it. Objection sustained and bill sealed for defendant.

EMORY A. WALLING, P. J. [SEAL.]

Q. What is the object in using a dilute sulphuric acid in the Hortvet method: the real Hortvet method, not Mr. Evans' method as described by Dr. Hortvet. What is the object of using this first solution of one and two sulphuric acid?

106      A. The object is to wash out the sugar which is present in sweetened products like ice cream and sweet condensed milk. The ordinary Babcock test as applied to fluid milk or just plain cream.

densed milk without any sweetening were used on the sweetened product, a product containing a considerable percentage of sugar, the result would be that when the strong acid is put into the Babcock bottle, into the small flask, the sugar would char and the liquid would contain a large amount of black charred sugar floating in this liquid, which would not dissolve and which would go up into the neck of the flask, just as the crude fiber does in the chocolate ice cream, and part of it would float around in the mass of the liquid just as the crude fiber does in chocolate ice cream and hold back the fat. Now to overcome that—that has been recognized ever since the Babcock test was devised, that was recognized as a defect in applying this method to a sweetened product, and chemists have been endeavoring to overcome that difficulty, and one of the methods is this one that Dr. Hortvet devises, of washing out the sugar with a dilute acid and drawing it off and then putting on the strong acid on the curd and fat and this way removing the sugar and secondly not having that charred mass, which would make the test 107 worthless if it were allowed to remain there. It would be impossible to get any accurate readings of fat if the chemist attempted to put the strong acid right on the sweetened product and have all that charred material floating in the liquid.

Q. In testing chocolate ice cream by this Hortvet method, the real Hortvet method now, what is the appearance after this first solution is made, if the fiber from the chocolate bean: where is it in the bottle?

A. The fiber after the first treatment with the dilute acid in the treatment which is designed to wash out the sugar in the fiber will go with the curd and the fat—will float on this dilute acid and will be held there with the curd. The liquid below when an ordinary dilute acid treatment is used will be turbid if the ice cream contains a material like gelatine or gum. The gelatine or gum is not caught in the curd so that it floats around in this dilute acid and makes a liquid that looks about like water that had a few drops of milk put into it. That gum and gelatine floating around in the liquid is drawn off with a syphon or pipette when that acid is drawn off and washed and in drawing that off a little fat goes with it. Some fat floats around with that; it is held there. This gummy material holds a little fat and that is one place where fat is lost in that 108 method; it is drawn off with the dilute acid and wash water.

The fact that that liquid is turbid is the result of my own observation in a number of tests of this kind, and also is mentioned very commonly by other chemists who have written on the subject; written articles and written paragraphs in books on the subject of testing ice cream. There have been several methods devised to overcome that very difficulty. In the second part of the test, where the strong acid is used in the final Babcock test, where the acid is put in to whirl out the fat, after the fat is whirled up into the narrow neck of the bottle, the end of the test the bulb of the bottle is filled with acid, with water on top and then a column of fat in the neck of the bottle—in some portion of the neck. Now this fiber which floats around in the liquid and won't dissolve in the strong

acid is partly whirled up into the fat column, and as I have already described makes it impossible to get a sharp reading; there is no sharp line to read from. It is a guess as to where the end of the fat column is. Part of it is caught in the shoulder of the bottle; isn't able to get up into the neck; is caught. You see the shoulder runs in partly and it is caught in the shoulder of the bottle, and that holds back fat. Now this fiber as I have already said is sub-

stantially the same thing, chemically the same thing as wood  
109 fiber. Every one knows that wood floats on water. This acid is, even when diluted, even when the water is added to it in the final whirling, is half again as heavy as water. Now that will float on water and will surely float on that acid.

Q. Assuming that Mr. Evans testified that this fiber was not on the top, it was on the bottom of the bottle, have you in your experiments ever found that to be so?

A. No sir, never.

Q. In your opinion as a chemist could it be so?

A. It could not, not in a sulphuric acid solution, especially after it has been whirled.

Q. If it is necessary to add an acid to get rid of the sugar, why wouldn't it be equally necessary to get rid of this fiber?

A. It is equally necessary to get rid of the fiber. In the chocolate ice cream no way has been devised by which the fiber can be gotten rid of in a centrifugal method. It is just as essential that the fiber should not be there as it is that the charred sugar should not be there, because it acts even more actively in holding back fat than the charred sugar would. The fiber is slimy, when it comes in contact with the acid it gets slimy and holds not only on the surface but in the mass itself—buried in the mass itself, the fat and some

of the other materials in that ice cream, so that the acid  
110 cannot get at them and liberate them; whirl them up in the neck of the bottle. The charred sugar is just like charred coal. It is not slimy. The mere fact that it is solid is sufficient to hold back the fat in that case.

Q. Mr. Evans told us that he got a clear reading and a clear solution with the fiber on the bottom of the bottle at the conclusion of his test: in your opinion is that possible?

Objected to as leading.

Q. Assuming that Mr. Evans testified that he got a clear reading at the conclusion of this test, that the fiber was on the bottom of the bottle, that his solution was clear: what have you to say to that from your experience in making these tests?

Objected to, as Dr. Evans did not so testify.

The Court: I think the question is competent: It is on the assumption that he so testified. The jury can remember what he testified.

A. In chocolate ice cream it would be impossible for any portion of the fiber to remain in the bottom of the bottle after whirling.

Q. I understood you to say that this fiber carried with it fat?

A. Yes, the fat. The fat clings to this solid material.

sticks to it, and consequently could not be in the neck of the bottle, and also is what the chemist calls occulted, that is it is concealed in the fragments of fiber, so that the acid cannot get at it and it cannot be carried up as part of the clear fat in the neck of the bottle.

Q. Mr. Ashman testified that it was his opinion, though he had made no tests, that the fiber would not carry fat. What have you to say as to that. Have you actually made those tests?

A. I have actually filtered out that fiber from the bottle, in an actual test, several times—in actual tests on chocolate ice cream. And then taking that fiber and putting it in an abstraction apparatus and dissolving out the fat with ether and obtained varying quantities, in some cases as high as three or three and one half per cent. of fat, which was held there by the fiber, which I actually extracted from the fiber after the test was completed. That is not a thing that could be determined one way or the other by plain reasoning: it is a question of experimental test.

Q. When you refer to the per centage do you refer to the percentage of the entire sample?

A. When I speak of that per centage I am not referring to the original material—the original ice cream.

Q. Mr. Evans testified that in making these tests that he did not give his bottle at the conclusion a hot water bath. What have you to say as to the necessity of a test of this kind?

A. It is very essential and necessary in order to get accurate readings of the fat, in the Babcock test. That is true not only of testing ice cream with the Babcock test but testing anything with the Babcock test. When these bottles are first put into the centrifuge they are very hot. When sulphuric acid is mixed with water it gets very hot; there is a good deal of heat developed, and when you mix milk or diluted ice cream with strong sulphuric acid the acid that is used is almost the full strength concentrated acid, so that when that is mixed with the watery liquid like diluted ice cream or ordinary milk that gets very hot. The bottles are whirled and then finally filled up with hot water so as to bring the fat column up into the narrow portions of the bottle. In the first whirling when the acid and milk or diluted ice cream are put in the bottle it is filled about two thirds full; just a little below the shoulder, in the quantities ordinarily used. That is whirled first. Then the hot water is put in right to the bottom of the neck and the bottles are given one minute whirling again, then they are filled up almost to the top with water and again whirled, so as to bring the fat column up into the graduated portion of the Babcock bottle. That is all done hot. The liquid is very hot in the first whirling and hot water is used to fill up the bottle. Now working in an ordinary room the temperature of the room is very much below the temperature of the bottles, and all the time after the last filling with the hot water those bottles are cooling down, if a hand Babcock machine is used, or any Babcock machine which is not heated. Those bottles are cooling down and the fat column is dropping and the time that is used in taking them out of the machine and reading them that bottle is constantly cooling



—surrounded by cool air. That acts just like a thermometer. The bulb is cooling. Naturally that drops. That column is dropping constantly and as it drops the fat column is away at the top of the liquid, the top portion of the liquid, and as it drops it is dragging the fat column down this narrow neck of the bottle. Naturally it is impossible to draw a fat column along a narrow tube of glass like that without leaving some fat clinging to the glass. There is a film of fat on that glass; it is greasy, above the fat column. It may be too thin, that film so thin it cannot be seen by the eye, but it is impossible to draw a fat column down over glass without leaving grease sticking to it. Now that grease film is fat and all that

114 fat that is left sticking to that glass is fat that is not represented in the fat column, and these divisions it doesn't take much fat to make up one or two of those divisions, consequently the reading is low. The final result that is gotten is low by just the quantity that is left sticking to that glass. For that reason the method that is always used where careful fat determinations are made by the Babcock test the bottles are taken out of the machine and put in a hot water bath—stood in hot water so as to keep them hot, so that contraction won't take place, and that if the contraction has taken place below the limit of the temperature that is prescribed for the Babcock test the reverse action will take place. It will be pushed up some and it will gather into the fat column and read with the rest of the fat. That is the object of the water bath. The water bath is a convenience to the chemist in addition to being more accurate: that he can put his bottles after they are whirled, put them in a hot water bath and they will stay where they were when he took them out of his machine and he can read them at his leisure; but that is a mere matter of convenience.

Q. Mr. Ashman testified that he obtained the same results with an abstraction method as he did with this method which Mr. Evans told him about. In assuming that a man takes an abstraction method, carefully carries it out, and assuming also that 115 takes this method of Mr. Evans and carefully carried it out in your opinion as a chemist would it be possible for him to obtain the same results?

A. Not on a chocolate ice cream.

Q. Assuming, as was testified to here, that this acid used would dissolve fiber, would it then also dissolve nuts?

A. It certainly would. The nuts are made up of fat and starch and fiber; a great deal of fiber, and the fiber is just the same character of the fiber of chocolate, the same chemical character, and anything that would dissolve fiber in chocolate would also dissolve the fiber of the nuts.

Q. In your opinion is it a proper test in testing a sample of cream for nuts to look at it and taste it.

Objected to as immaterial, unless they propose to show this nut ice cream.

The Court: Your questions are leading; you are doing most of the testifying; let the witness do the testifying.



Q. In your opinion what would be a proper test to determine whether nuts were present in an ice cream?

A. Examine under the microscope. Take some of the ice cream and put it on a microscopic slide and look at it magnified and you could see the particles of nuts, no matter how finely ground  
116 they were.

Q. What would be your opinion as to the sufficiency of the test of the eye sight and taste of the operator who is working at the sample?

A. Eye sight would be of no use at all in determining the question conclusively. It would depend entirely upon how coarse the ground material was, whether you could see it at all, and especially if a material like ice cream were colored—had a dark color.

Q. Now take a chocolate ice cream, in your opinion would it be possible to taste the flavor of nuts in a chocolate ice cream?

A. No, it certainly would not; the flavor of nuts is a very delicate one and chocolate has a very decided flavor. The flavor of the chocolate would cover up any flavor of nuts.

Q. Until you heard this method described by Mr. Evans, did you ever hear of any chemist using such a method, or ever know of any authority that laid down such a matter?

Objected to.

The Court: Your questions are entirely too leading.

Q. Will you tell us what you previously heard about this method that Mr. Evans used, previously read, before you heard him describe  
117 it: what you know as a chemist about the method described by Mr. Evans?

A. I had never heard of the method exactly as described by Mr. Evans until a couple of months ago, when I heard Mr. Evans himself.

By Mr. Brooks:

Q. Which method?

A. The method which Mr. Evans used in the examination.

Counsel for Commonwealth objects.

By the Court:

Q. As to what?

A. For determining fat in ice cream; exactly as he described it. I had never heard it until a couple of months ago, when I heard Mr. Evans himself describe it. I knew of the Hortvet method—the method devised by Dr. Hortvet—described in his report, which is in general the same as the one described by Mr. Evans, except as I have already said Mr. Evans has introduced a feature of manipulation which is not in the method as described by Dr. Hortvet himself.

By Mr. Carlin:

Q. How long does it take to make an accurate fat determination of chocolate ice cream?

A. That would depend to some extent on the method used. The extraction methods will differ in the length of time they  
 118 take. The extraction method which I have found to give the most satisfactory results takes—I have never actually timed it, but I should say it would take 24 hours of actual work. It takes actually 16 hours—should have from 16 to 18 hours of extraction—that is, it should be under the effect of the ether for at least 16 hours, and possibly a few hours more would cover the other features of the test.

Q. In your opinion as a chemist, are the extraction methods the only accurate methods for determining?

Objected to.

The Court: I think you went over that yesterday.

Q. What would you say as to the accuracy of this method described by Mr. Evans, for determining the amount of butter fat in chocolate ice cream?

Objected to, as having been gone over before.

The Court: I think so; I think he said the method was not good.

Q. In your opinion, assuming that an ice cream showed under the test as used by Mr. Evans that it contained 2.7 per cent., in your opinion as a chemist might there well have been actually present in that sample more than eight per cent of butter fat?

Objected to.

Objection sustained on the ground of the question being leading.

119 Q. Assuming that a sample of chocolate ice cream tested by Mr. Evans' method showed 2.7 per cent., what amount might it have actually contained, in butter fat?

A. It might contain almost anything above that. I have actually found cases where the test showed six per cent. below the actual quantity there by this method.

Cross-examined by Mr. Brooks:

Q. You obtained your education in the chemical department of Columbia University?

A. Yes sir.

Q. You heard Dr. Evans and Dr. Ashman testify?

A. I did.

Q. They received their educations in institutions similar?

A. Yes sir; I think Dr. Ashman said he was in the same university.

Q. Now you say that after you graduated from Columbia you took a post graduate course?

A. Yes sir.

Q. And you have been practicing about 21 years?

A. Yes sir.

Q. Now in 1896 I think you said you became chemist of the city of New York?

A. Chemist in the Health Department of the city of New York.

120 Q. And that was a position similar to the state chemist in the different states?

A. Well the work is somewhat similar. It is an actual salaried position.

Q. How long was you in the employ of the Health Department of the city of New York?

A. For eight years.

Q. I think you said you had examined several thousand samples of ice cream?

A. I said with the aid of my assistants.

Q. When did you begin examining these ice cream samples?

A. When I went into the Health department. The bulk of my work on ice cream has been since I came from the Health department.

Q. You began in 1896?

A. In the Health department.

Q. But you say a large share of your examination of ice cream samples has been since you left the Health department?

A. Yes sir.

Q. How did you happen to examine these samples when you were in the Health department of New York City?

A. Samples brought in by the inspectors in general food work. Simply to keep informed of the character of food on sale.

Q. What was the purpose: what would you examine them to determine?

121 A. We examine principally for preservatives—injurious material—and we used to run butter fat determinations in order to determine the general amount of fat.

Q. Then back as far as 1896, when you went into the Health Department of New York, they were investigating this proposition of the requisite amount of butter fat in ice cream?

Objected to.

The Court: You can ask if he was investigating.

Q. Back in 1896, when you went into the Health Department, you as the chemist for the Health Department were investigating this proposition as to the requisite amount of butter fat in ice cream?

Objected to.

Q. To investigate the amount?

A. In connection with general examinations of ice cream I used to determine the total solid matter in it. I used to determine figures—see the amount of sweetening and determine the fat. That as in connection with the general examinations of ice cream as a food product.

Q. And you continued those examinations all during your term as chemist of the health department of New York City?

A. Yes sir, at intervals. I didn't do it to as great an extent as I did since leaving the health department.

Q. Since you have left the health department for whom have you been making these examinations of ice cream?

122 Objected to.

Objection overruled, evidence admitted and exception sealed for defendants.

EMORY A. WALLING, P. J. [SEAL.]

A. Principally for ice cream manufacturers.

Q. To determine what, have you made these examinations for ice cream manufacturers?

A. Various questions will come up. I have cases of ice cream sent to me to determine whether it contains gelatine or other gums; whether it contains condensed milk. Sometimes for general composition of the ice cream. Ice cream manufacturers want to know what their competitors are making and they send me the samples and want me to tell them as near as I can; also in making routine tests for their own products.

Q. You are now in the employ of these same ice cream manufacturers?

A. For some of them, yes.

Q. How much do you get a day for testifying?

A. My per diem charge is \$50.

Q. And expenses?

A. And expenses.

Q. Chemistry is an exact science, is it not?

A. Not as exact as we would like to have it. It is not an exact science in the same sense that mathematics or astronomy is.

123 an exact science.

Q. It is just about next to it?

A. No, I wouldn't say that. It is a comparatively inexact science in a great many departments of the work.

Q. Hasn't chemistry practically come to be known among scientific men in the scientific world as an exact science?

A. Well, that term exact science is not—

Q. Answer my question.

A. When compared with mathematics or astronomy it is comparatively an inexact science. When compared with some other sciences like sociology or biology it is an exact science. It is a matter of comparison.

Q. Sociology is not a science, is it?

A. It certainly is.

Q. I thought it was an art?

A. I would call it a science.

Q. You start on the general proposition that the Babcock bottle which you have in your hand receives its name from the author of the Babcock method?

A. Yes sir, Prof. Babcock devised the method.

Q. And Dr. Babcock's method of extracting fat from milk and cream is the official method?

A. Yes sir, for milk and cream.

Q. So you agree with Dr. Evans and Dr. Ashman, insofar as the method used after the sugar was extracted is the official

124 method?

the official method for milk and cream. Milk and cream don't contain any added cane sugar and consequently there is no necessity for using all this preliminary work. In testing the ordinary official Babcock method is simply to take a certain amount of the material and put strong acid on it and whirl it.

Q. I understand, but the Hortvet method is a method used in conjunction with the Babcock method, as testified by Dr. Evans, for the purpose of determining the fat in ice cream?

A. No, it is not. That is misleading, to answer it simply with a no.

The Court: You can answer with a no and explain.

A. It is not—the Babcock method used in conjunction with another method. It has some of the features of the Babcock method adapted to use in another method.

Q. Do you know what the Hortvet method is?

A. Yes sir.

Q. What it is?

A. Do you want me to describe the method?

Q. What is the Hortvet method for?

A. It is intended to determine fat. I suppose you mean the Hortvet method as applied to ice cream. It is intended to determine the amount of fat in a sample of ice cream.

125 Q. Then that is the Hortvet method?

A. That is the Hortvet method as applied to ice cream. Dr. Hortvet devised his method originally for determining fat in condensed milk.

Q. Then there is a method known to the chemical science as the Hortvet method to determine the fats in ice cream?

A. There is a method which has been described by Dr. Hortvet for that purpose.

Q. Dr. Hortvet is the head of the dairy and food commission of the state of Minnesota?

A. He is the state chemist; not the commissioner.

Q. And that is the man who has given to chemistry this method?

A. Yes sir.

Q. I think you said that the use by Dr. Evans of the pipette would not give as satisfactory results as if he had used the syphon for drawing off the diluted sugar?

A. Yes sir.

Q. How much variation would there be between the two?

A. I couldn't tell; it is entirely a question of manipulation. The difficulty of operating is greater in that test, the danger of loss of fat is greater. What elements of danger that is none can say; that depends on the operator.

126 Q. That is a Babcock bottle similar to yours?

A. Yes sir. substantially the same as mine. That was a pipette before it was broken.

Q. That is a syphon?

A. Yes sir, except that Dr. Hortvet recommends using a narrow tube.



Q. After you put your sample of ice cream in a bottle you dilute that with sulphuric acid, two parts of sulphuric acid to one of water.

A. I think it is the reverse: one of acid and two of water.

Q. After that bottle is put in there how many grams do you put in the bottle?

A. Usually anywhere from nine to twelve.

Q. Then after that you put the syphon in before you agitate it.

A. Before it goes into the centrifuge. Of course these are things that Dr. Hortvet recommends.

Q. You put that in and it goes clear to the bottom?

A. Yes sir.

Q. Now doesn't the syphon fill up with the diluted ice cream to the same height in the syphon as it is in the bottle outside of the syphon?

A. Yes sir.

Q. Then when you apply it to the whirling motion the portion of the substance which was in the tube still remains in the tube?

A. Yes sir. Dr. Hortvet recommends to blow it out.

Q. Then when you start after that to draw out the liquid in the bottom the portion that was in the tube is in there and that comes out first?

A. I have already said Dr. Hortvet realized that fact and in his description of the test especially says "blow out the portion of liquid in the tube—gently blowing that out so it goes up into the—"

Q. Then whatever fat there might have been in that tube when you blow it out of course goes into this stuff in the bottom?

A. Yes sir. As I have already said Dr. Hortvet recommends using a very narrow tube. This is by no means a narrow tube. Dr. Hortvet recommends in his description of the test putting in two tubes: one that is to go to the bottom of the bottle, the other to form an air vent, simply passing right through the stopper, and they are both to be put through a cork or rubber stopper and fastened at the top of the neck, consequently it would be impossible to use a tube anywhere near that diameter. Now a very narrow tube would contain very little liquid when being put in, consequently that little liquid will contain very little fat, and moreover you blow it out, the amount of fat that gets in there is not much at all.

128 Q. The method used by Dr. Evans is after this bottle has been whirled in the centrifuge he takes these instruments here, puts his finger over the top, keeping it air tight?

A. Yes, sir.

Q. Now, then we have this filled up to here, with the liquid you want to get rid of down below, the curd and fats are here?

A. Yes, sir.

Q. Now with his finger up there you run that down?

A. Yes, sir. You see the difficulty is when he pushes that down that so much of the fat sticks on the end and is crowded down therefore some of the fat gets out. My own objection to that was pushing it through a layer of fat and crowding it causes a commotion in the upper layer of curd, which stirs it up and very fat is thrown along to the bottom of the liquid.



destroy some of the effect of the whirling motion that you have used already to bring that curd up. That is not only my own observation. The fact that Dr. Hortvet so carefully devises a method to overcome that difficulty shows that he has experienced the same difficulty.

Q. Do you mean to try to make this jury believe that by taking that bottle absolutely quiet in the hand of the chemist that he could not put that down through there without driving any of that curd substance down, so as to come out in the bottom there?

A. I mean to say he would be taking very grave risk of doing that very thing, every time he did it. In fact in most centrifugal methods, even Dr. Hortvet's device, is not considered satisfactory, but the liquid is syphoned off thru a filter, through a piece of cloth, so as to catch any of those little particles which are drawn off occasionally and wash them back into the flask. That is a common observation that those little particles do go off.

Q. That was your objection?

A. That was my objection.

Q. Don't you think that when you blew on here with sufficient force to force the fat that was accumulated in the top of that tube and all the stuff in that tube the same depth as the stuff in the bottle, don't you think when you blew that out there it would agitate the contents of the bottle fully as much as putting the pipette down through there?

Objected to.

A. Of course, if you blew a blast of air through the bottle.

Q. I asked if you blew enough to get that fat; you talk about the curd and fat that sticks on the bottle: now if it stuck on there why wouldn't it stick on the inside of that smaller tube and why wouldn't it require a little force to blow it out?

A. There is very little of it, on account of the narrow tube. You are using a very wide tube. The amount of liquid in the tube would be extremely small and when blowing that out you watch the column of liquid and blow very gently. In fact the best way to do it would be not to blow at all, but use a pressure from some other source—water pressure—a blow that so gently a watch the liquid so you let out only a single bubble of air.

Q. I think you said you put nine to twelve grams in this Babcock bottle?

A. That is a matter of convenience; chemists vary in the amount they use.

Q. In that nine grams of cream about how many grams of chocolate would there be, in chocolate ice cream?

A. That depends on the chocolate ice cream; I couldn't tell that; that varies very widely in different chocolate ice creams.

Q. Give us the average?

Objected to.

Q. Ten per cent. would be very strong chocolate?

A. Yes, sir, I think that would be very strong chocolate.

Q. Suppose there would be ten grams of the ice cream, there would be about one gram of the chocolate?

A. Approximately.

Q. What proportion of that chocolate is fiber?

131 A. That will vary in different chocolates.

Q. I am talking about the chocolate put in ice cream.

A. They use both chocolate and cocoa.

Q. In chocolate.

A. The fiber in chocolate will run around 3 or  $3\frac{1}{2}$  per cent. if it is the pure chocolate, without any of the cocoa butter taken out.

Q. Then there would be about one thirtieth of a gram of fiber in that nine grams of ice cream.

A. Assuming your figures, yes.

Q. Now then after you have taken the sugar out with the syphon or with the pipette, then you put in another solution?

A. Wash with water. That is simply to rinse out the last of the acid.

Q. Don't you put in some strong sulphuric acid?

A. Before the final whirling. It is first washed with water. It is diluted up to about the capacity of the bottle as it would be after using an ordinary fluid milk. In other words, it is diluted with water to about  $17\frac{1}{2}$  cubic centimeters, then the strong acid is added.

Q. After you add the second acid into this bottle, about how many grams do you have in the bottle?

A. It would be about 35 cubic centimeters; it would be something over that in grams, because the liquid is heavier than the water; possibly forty grams. I haven't figured it out, but that would be approximately.

132 Q. Then at the time this reading is made up here there are in this bottle from 35 to 40 grams of contents?

A. That is about right.

Q. And of that about one thirtieth of one gram is chocolate fiber?

A. Approximately.

Q. Then one-nine-hundredths of the contents of that bottle, or one one-thousandths, is chocolate fiber?

A. In weight. If it is 40 grams it would be  $1/1200$ ; if 35 about  $1/1000$ .

Q. You think that that  $1/1100$  of a gram of fiber would retard the fat from going up into that bottle?

A. I know so; I don't think so at all. It is not a question of thinking.

Q. By the extraction method the fats are separated by solvents are they not?

A. Yes, sir.

Q. I think you said though that sulphuric acid would dissolve the fiber?

A. No, sulphuric acid will not dissolve fiber. As Mr. Evans

Mr. Ashman, I forget which, explained, in the destruction of crude fiber and crude products generally, the material is first boiled with acid and then boiled with alkali, but what is left is the crude fiber, so that the crude fiber does not dissolve in acid.

133 Q. Do you say the fiber in chocolate such as is used in ice cream will not be separated, or dissolved, by sulphuric acid such as used in this Hortvet test?

A. It will not be dissolved by sulphuric acid.

Q. You explained about the extraction method and the fact that ether would take out the fats; does not that method extract the fat out of the chocolate?

A. Certainly.

Q. Then by the ether method in addition to getting butter fat you have the chocolate fat?

A. That is true of all these methods; no difference in that respect in any of them.

Q. The Hortvet method does not extract the chocolate fat?

A. It certainly does.

Q. In addition to the butter fat in this test he also had the chocolate fat?

A. Yes, sir, he certainly did.

Q. About what proportion of that fat would you say was chocolate fat?

A. There again it depends on how much chocolate there was in it, and whether it was chocolate or cocoa.

Q. There wouldn't be very much chance for chocolate fat in 2.7 per cent?

134 A. I shouldn't think so, if that were all the total fat there.

Q. What proportion of chocolate is fat?

A. You are talking now of chocolate and not cocoa? It will vary anywhere from 48 to 56 per cent. It will average about 51 or 52 per cent.

Q. What is cocoa butter?

A. Cocoa butter is the name applied to cocoa fat—to chocolate fat.

Q. Then over one half of the chocolate is fat?

A. As a rule, yes.

Q. You wouldn't say this emersion you have testified to here is recognized as an official part of the test: would you say as a chemist that the emersion that you have talked about here is an official part of the test?

A. No, that part of it is not. The fixed temperature is.

Q. Then why did you lay so much stress on saying that this emersion should be made in order to arrive at the correct test if it is not officially recognized as a part of the test?

A. Fifteen years' experience in making fat determinations by the Babcock test has taught me that.

Q. Fifteen years' experience in trying to get as much fat out of that ice cream as possible?

A. Not ice cream. I have made far more tests on milk  
135 and cream with the Babcock test than ice cream.

Q. Do you mean to say that you have to take a microscope to find out whether there are nuts in ice cream?

A. I didn't say you have to; I said you might have to, to determine the fact conclusively. If the nuts are finely ground you couldn't see them by any means except with the microscope.

Q. When you eat nut ice cream don't you know it?

A. Some times I do and some times I don't. If I eat it without knowing it I cannot say. I may have eaten nut ice cream a number of times without being conscious of the fact.

Q. When you order nut ice cream and you have to have a microscope to find out whether there are any nuts in there, you do not think you are getting nut ice cream?

Objected to.

Objection overruled, evidence admitted and exception sealed for defendants.

EMORY A. WALLING, P. J. [SEAL.]

A. If I order nut ice cream I should probably want to be conscious of the fact that I was eating nut ice cream.

Q. And if you ordered fruit flavored ice cream, when you got it you would want to be conscious of the fact you was eating it?

A. I think I should.

Q. You usually are?

136 A. I wouldn't want to say that.

Q. What if the object of putting fruit in ice cream?

Objected to for the reason that he is not qualified as an expert on the manufacture of ice cream, and what the purpose is of putting fruit in ice cream is entirely outside of the case.

The Court: I don't know that the witness has any expert knowledge about putting fruit in ice cream.

By Mr. Carlin:

Q. In speaking of this Hortvet method and its difficulties and comparing it with this rapid method of improvement that Mr. Evans has testified that he used, you don't wish us to understand that you approve of that method: the Hortvet method or the Evans method?

Objected to.

The Court: I don't see as that is very important.

Q. In speaking of the chocolate fiber, of its comparison in weight would its bulk compare differently than its weight?

Objected to.

Q. What would you say as to that?

A. There is a wide difference between the weight of a material like fiber floating around in the liquid and the relative bulk. This fiber when treated with acid as I have already said swells up and gets slimy and looks like a great deal more when it is floating around in the liquid than it actually is when filtered

out and dried and weighed. It is not just the fiber: it is fiber and moisture and acid and things clinging with the fiber, so that the comparison of the actual weight without any idea of the bulk is entirely misleading. That is true not only of fiber floating around in the liquid like this, but it is true of a sediment floating in a bottle of water or liquor. The sediment when the bottle is held up looks like an enormous amount of sediment, but when it is filtered out and dried it is almost nothing at all. In that respect a comparison of the weight with the bulk is far different.

Q. In regard to this hot water bath and its use in the official method, by the official method you refer to the method for testing milk and cream, not ice cream?

Objected to as leading.

Q. What do you mean when you refer to the official method?

A. The official method for determining fat and cream in milk, by the Babcock test.

Q. And does that official method prescribe anything in regard to the temperature at which the reading must be made?

A. It does; it prescribes these readings shall be made between the temperature of 130 and 150 degrees Fahrenheit.

Q. And what is the object of the hot water bath that you spoke of?

The Court: I think he has explained that.

Q. Have you made actual experiments yourself with taking samples from various portions of a brick or sample of ice cream?

Objected to.

Q. Have you made the experiment?

The Court: The objection is sustained; the question is leading. Exception sealed for defendants.

EMORY A. WALLING, P. J. [SEAL.]

Q. Have you made any experiments in regard to the taking of samples from various portions of a can?

Objected to as immaterial.

The Court: We will allow that question, as preliminary.

A. I have.

Q. Will you state what the result of your experiments was?

Objected to as immaterial.

The Court: That is the same question we had up yesterday afternoon. I am still of the opinion that is not material to this case. The objection is sustained and an exception sealed for defendants.

EMORY A. WALLING, P. J. [SEAL.]

By Mr. Brooks:

Q. During the final process by which the fat is forced up into



the neck of the bottle, it is forced up there by this centrifugal motion in the machine?

A. Yes sir.

Q. Do you mean to say that this small amount of fiber, which you say is light and bulky, that that would get in the way of the fat and prevent the fat from going up into the neck of that bottle?

A. No, I didn't say that: I didn't say it got in the way of the fat or prevented it from going up into the neck of the bottle. I said some of the fiber went up into the neck of the bottle with the fat and so combined with the fat or mixed with it that it was impossible to get a sharp reading of the fat column, and also that this solid material, this solid fiber floating around in the liquid held fat particles, either on the surface or in the slimy mass, so that it did not separate and go to the top. The whole idea of the Babcock test is to dissolve everything in the milk product and leave only the fat, so as to allow the fat free to collect in the narrow neck.

Q. And the object is to have all of the light materials at this end of the bottle?

140 A. No, the heavy materials at this end.

Q. And the light materials in this end?

A. In the neck.

Q. You say some of this does stick to it and prevents the reading?

A. It goes up into the fat column.

Q. Then wouldn't the fat column be increased by just as much as the fiber sticks and goes with the fat into the fat column?

A. If you read the fiber of course. It would simply be a case as to what the per centage of fat shown there was.

Q. But you make your reading on the bottle?

A. Some place on the bottle.

Q. You don't go down here and take out a little bit for fat and down here a little for fiber?

A. That is just the difficulty of the test.

Q. You read everything that is in that bottle in the fat column?

A. If you did you might find ten per cent. of fat that only contained three.

Q. If Dr. Evans read everything in that column he read, in addition to the fat he got some fiber?

A. He was reading liberally in the column, but he wouldn't be reading the fat that was in the fiber.

Q. Do you mean to say as a chemist that after this test has been applied, after this has been placed in the centrifuge that the fat that might be in there could be held from going up into the neck of the bottle, by that little fiber?

A. I have already said that I don't only believe it but I have taken the fiber out of the bottle, washed it with water, put it into the apparatus and actually got the fat out, so I could see it and weigh it—out of the fiber—out of the fiber that was floating in the liquid.

Q. How much fiber was in the fat up here?

A. I didn't weigh that; that I washed out of the fat.

Q. Then you mean to say this 1/1100 part of fiber could hold the



fat down in this part to an appreciable amount and the fat which is supposed by this operation to be put up in here would not have any fiber in an appreciable amount in it?

A. No, I wouldn't say that.

Q. Isn't it a fact the chances of the fiber being in the fat column would be greater than the chance of the fat being in the other part where the fiber is supposed to be?

A. You are talking about chances. That is just the objection I have to the test; It is guess work.

Q. What do you say about that?

A. Well, it might and might not.

142 ALBERT W. SMITH, sworn, and examined by Mr. Carlin, testified as follows:

Q. What is your profession?

A. I am professor of chemistry at Case school of Applied Science in Cleveland.

Q. Are you at present professor there?

A. Yes sir.

Q. What university are you a graduate of?

A. I graduated first at the University of Michigan, then at Case school.

Q. At the University of Michigan did you take a course in chemistry?

A. Yes sir.

Q. Four year course?

A. Yes sir.

Q. Then at Case school. Where is that?

A. Cleveland. Then at the University of Zurich in Switzerland, where I got a doctor's degree.

Q. What year did you graduate from the University of Michigan?

A. 1885.

Q. And since that time have you been continuously engaged in your practice as a chemist?

A. Not in practice. I was a student a part of the time. I have been engaged as a professor at Case school since 1891.

143 Q. During that time you devoted all your time—

A. I have been employed all this time by the Case School, and at the same time I did work in other directions. For four years I was chemist for the Ohio Dairy and Food Commission.

Q. And during all of that time have you examined food products?

A. Yes sir.

Q. Have you made any examinations of chocolate ice cream for determining fat: the contents thereof?

A. Yes sir.

Q. Did you make any determination by the method you have heard Mr. Evans describe?

A. Yes sir.

Q. And did you make any determinations by the Hortvet method?

A. No.

Q. Did you make any determinations by any other method?

A. I made in the same sample in which I made the determination by Mr. Evans' method, determinations by three other methods.

Q. Will you tell the jury just what your findings were and how you made these tests, in a general way?

A. In the sample of chocolate ice cream I first made a determination by absorbing the weighed sample with dry fat free  
144 gypsum or calcium sulphate, drying the sample, placing it in a capsule and extracting with pure ether. The second method was to use in the place of fat free calcium sulphate or gypsum fat free filter paper. This is known as the Adams method. And then extracting the dry portion with pure ether.

The third method was known as the Roesse-Gotlieb method, in which the sample is mixed with water and the solution extracted with a mixture of gasoline and ether.

The results obtained by these three methods were concordant. The greatest variation I think was two-tenths of one per cent, each method being carried out in duplicate.

On the same sample I then made eight attempts to determine the fat by the method described by Mr. Evans, and obtained results varying from 1.5 per cent to 4.1 per cent.

These three methods are the three general ways in which fat is determined in milk and cream.

Q. In your opinion as a chemist what would you say as to the use of any centrifugal method for the determination of butter fat in chocolate ice cream?

A. I think in some ice creams it might be possible by the Hortvet method to get reasonably accurate results, but I think in chocolate ice cream or any ice cream where there is a residue not soluble  
145 in sulphuric acid that it is impossible to get accurate results by this method; by any centrifugal method.

Q. Comparing the results obtained by the extraction methods and by this method of Mr. Evans, what did you find to be the difference in percentage of fat?

A. The sample that I examined contained six and one half per cent of fat by the extraction methods, and the lowest result I obtained by Mr. Evans' method was one and five-tenths per cent, a difference of five per cent. The smallest difference was 2.4 per cent.

Q. Did you find the extraction methods always brought out more fat?

Objected to.

Q. What did you find as comparing the method as to the amount of fat?

A. I invariably obtained higher results by the extraction method.

Q. In your opinion as a chemist is it possible to preserve ice cream and bring it into this court room before the jury, so it could be tested?

A. Yes sir.

Q. In testing chocolate ice cream by this method of Mr. Evans will you please tell us just how the fiber of the chocolate appears

the different stages of the operation and what the effect of that is, if any?

146 A. The Babcock test for determining fat in milk products is based on the fact that strong sulphuric acid dissolves everything in the milk except the fat; that the sulphuric acid is heavier than the fat, and therefore when you invert it in this machine the fat rises to the surface by centrifugal force. If there is anything in the mixture that is not soluble in the sulphuric acid the method is inaccurate, necessarily so, because this insoluble material necessarily will hold some of the fat which cannot escape from it, for that reason the method as applied to chocolate ice cream, which has this insoluble fiber in it, is inaccurate, because the fiber is mixed with the fat and there is no part of the process that is designed to separate it from the fiber, it stays with the fiber. I know that this is so in a sample of chocolate ice cream because I separated the fiber from the acid after removing the fat. That is to say, I made the regular test as described by Mr. Evans, collecting what fat I could in the neck of the bottle, then I removed the fat in the neck of the bottle carefully with dry paper, poured out the acid and fiber remaining in the bottle, diluted it with water, filtered it through a fat free paper capsule, washed it clean with water, dried and extracted it with ether and obtained 2.6 per cent fat as calculated upon the original sample of ice cream remaining in this fiber. I think it would be perfectly apparent to any one that if you mixed water with oil and put it in a bottle of that kind and then put in some shredded tissue paper, just a little bit, and shake it up there a short time and let it stand, or whirl it, that the paper, since it is lighter than the water, would retain some of the fat, prevent it coming up in the neck of the bottle. I think that can be seen by any one. That would be the result that the filter paper would stay down in the top of the bottle largely and retain some of the fat, and that is exactly what occurred in testing this ice cream.

Q. Mr. Ashman testified it was his opinion that the fiber would not convey away any fat, although he had never made any test. What is your opinion as a chemist?

A. I know by observation it does contain the fat, and a considerable portion.

Q. What would you say as to whether or not there was a clear solution at the conclusion of this test as used by Mr. Evans: is the solution clear when chocolate ice cream is used?

A. I think Mr. Evans was deceived because the liquid is dark colored. It is impossible to see through the bottle with the acid in it, because it is so dark colored, the material which the sulphuric acid has dissolved makes the mixture dark so that it is not possible to look through that and see whether the fiber is there or not; but if you take that same material and dilute it with water and filter it then you can find this fiber in all cases of chocolate ice cream I have examined.

Q. Mr. Ashman testifies that by using this method that Mr. Evans told him about, and by using an extraction method, he obtained the same results. In your opinion as a chemist is that possible?

Objected to as leading. Objection sustained and exception sealed for defendants.

EMORY A. WALLING, P. J. [SEAL.]

Q. Mr. Ashman testified that——

The Court: It is not a question of Mr. Ashman testifying. It is a question of his opinion.

Mr. Carlin: I believe I have a right to state to him the testimony.

The Court: It has not been the practice in this court to recite the testimony of one witness to another. Prof. Smith can state whether the same results can be obtained or not.

Q. In your opinion as a chemist can the same result be obtained by the extraction method as by the centrifugal method in chocolate ice cream?

Objected to as leading.

The Court: That is a leading question, but I guess we will allow it.

149 Q. What is your opinion as to that? What is your opinion as to the possibility of obtaining the same result by an extraction method and by a centrifugal method such as described by Mr. Evans?

A. I don't think it is possible to obtain the same results by those two methods. My reason for so thinking is that I personally tried, after twenty years' experience as a chemist and trying all sorts of methods, I personally tried to get the same results and was unable to do so, by a considerable difference.

Q. If sulphuric acid would dissolve crude fiber would it also dissolve nuts?

Objected to as leading.

Q. What would be its effect on nuts?

A. The effect would be very much the same; they are the same kind of material.

Q. Would sulphuric acid dissolve fiber?

Objected to.

The Court: That is a leading question.

Q. What is the effect of sulphuric acid on fiber?

A. Its only effect if it is strong is to char the fiber.

Q. Any other effect?

A. No.

Q. What in your opinion is a proper test as to the presence of nuts in an ice cream?

150 A. I should think the proper test would be a microscopic examination.

Q. What is your opinion of the test such as described by Mr. Evans, for the determination of butter fat in chocolate ice cream?

Objected to, that the proper question would be what in the science of chemistry, not what his personal opinion might be.

The Court: It is his opinion as a chemist. He is testifying as an expert. I think the question is proper.

A. I think it is quite worthless as a method for obtaining accurate results of fat in chocolate ice cream.

Q. Assuming that Mr. Evans using his method found two and seven-tenths per cent. of butter fat in ice cream: what would you say as to the amount of butter fat which might be present in the said sample?

A. If the sample were chocolate ice cream I should think there might be almost any amount present. One wouldn't know. My greatest difference was five per cent. That would make it seven and seven-tenths per cent.

Q. Is there a difference between the bulk of fiber and the weight of fiber in the chocolate ice cream, making this test in the bottle?

A. There would be quite a difference.

Q. Will you explain that to the jury?

A. The fiber when mixed with the acid swells up, gets very loose and spreads out over a good deal of space, while when it is dried and weighed it contracts to a very small amount.

Cross-examined by Mr. Brooks:

Q. You are now a chemist in Case school?

A. I have charge of the chemical department of Case school.

Q. For how many years have you been interested in investigating ice cream for the purpose of determining the amount of butter fat?

A. I think when I was connected with the state Dairy and Food Commission I had several samples of ice cream to analyze. I never analyzed any great number of them, but I have analyzed a great many analogous materials for fat. A very large number.

Q. Since you were with the state dairy and food commission your business has not been such as required you to make examination of ice cream for the purpose of determining the amount of fat?

A. Not especially ice cream, but a great many similar materials.

Q. Then you have no especial occasion to use the Hortvet method?

A. I have never used it before.

Q. When did you first use it?

A. On this case.

Q. How long ago?

A. About two weeks ago. In fact I never heard of it before.

Q. Then up until two weeks ago you knew nothing about the Hortvet method?

A. It is not a method given among the literature except one state bulletin, and that is where Dr. Hortvet is chemist.

Q. Dr. Hortvet is considered a very high class man in his line?

A. Yes sir, but he did not design this method for chocolate ice cream nor for any other material which contained matter insoluble in sulphuric acid.

Q. He designed it for ice cream generally?

A. He designed it as a modification of the Babcock method. The



Babcock method assumes and necessarily must have all the material soluble in sulphuric acid.

Q. What would be the difference between chocolate ice cream and coffee ice cream?

A. The difference would be that ordinarily the coffee ice cream would be flavored with a clear extract of coffee, while chocolate ice cream is a mixture of the cocoa bean with the material and the bean contains all of the substance, soluble and insoluble.

153 Q. A person who has used a certain method so long that he has become familiar with it is more apt to get an accurate test than one who does not know anything about the particular method?

A. Not if the method is fundamentally wrong.

Q. The personal equation amounts to the same in chemistry as it does in other lines of science?

A. Not in applying a method that is fundamentally wrong.

Q. An astronomer who has been looking for a certain planet for twenty five years is more apt to get nearer to it than one who has never looked for it?

A. It depends on the method. If he was looking through a tube without a lense he would not find it.

Q. From your experience with a chemist of the standing of Ashman and Evans do you think they would make an examination without the proper appliances?

A. I know they did because they so testify.

Q. You know they attempted to do it without the proper appliances?

A. I do.

Q. Do you base your reason upon the improper test upon the same ground that the other doctor who testified before based his?

A. I base it upon my opinion itself of the method. I know it is an improper method because the fiber necessarily holds some  
154 of the fat, which does not rise into the tube of that instrument.

Q. Do you say it would have been right if he had used the syphon instead of the pipette?

A. It would not have been right for chocolate ice cream. He might have got higher results, but not correct even then. The method is fundamentally wrong.

Q. As well as extracting the butter fat you extract the chocolate fat?

A. You get all of the fat that is there, in both cases. You get the mixture of the two fats. In the extraction method you get it all out and in the other case a part of the mixture.

Q. You say by the sulphuric method you get part of the fat out of the chocolate?

A. In both ways you get part of the fat.

Q. Then you differ from Dr. Deghnee?

A. No, he said the same thing.

Q. Then the sulphuric acid does separate the fiber from the chocolate?



A. A part of it. No, I didn't say that. I said the sulphuric acid separates the fiber from a part of the fat, but not from all of it.

Q. Then it starts a dissolution process of the chocolate fiber?

55 A. It chars the fiber.

Q. The only difficulty in your mind about this whole process is the small particles of fiber detaining the fat in the bottle and not allowing it all to go into the neck?

A. That is not the only difficulty. There is still a difficulty by the method Evans described, a part of the fat is carried out with the wash with the pipette and I found that so by three experiments. Getting this material out as carefully as possible with the pipette, filter it thru paper, washing it clean and getting the fat from that part washed out by the method described by Evans.

Q. These fibers retained the fat instead of going up into the bottle?

A. That is right.

Q. I think you said this fiber was very light?

A. It is very much lighter than the sulphuric acid in which it is mixed. The gravity of the sulphuric acid is about one and one half times that of water.

— How does it compare in weight to the fat; that is to the butter fat?

A. It is a little heavier than the butter fat. The gravity I should say was about twenty per cent. heavier.

Q. Heavier than the butter fat?

A. Yes, sir.

Q. But lighter than the sulphuric acid?

56 A. Yes, sir. So that in this test it would be at the surface most of it, as Mr. Evans described it.

Q. It would be at the surface of the acid after whirling?

A. Yes, sir.

Q. But it would be below the butter fat?

A. Mixed with the butter fat.

Q. Then it would be mixed up with the butter fat in the process of whirling and the general mixup?

A. Yes, sir.

Q. Then if there was some butter fat in the neck of the bottle there would also be some of the bulky fiber?

A. Yes, sir, very apt to be. It stays in both places; part of it stays below the neck and part is apt to come up in the neck, and to read the fat column you have to read it from where the fiber leaves off and fat begins and since the two are mixed it is impossible to get the column.

Q. Do you mean to say that while the fiber would retain the fat in this portion here (indicates), that the fiber would not be mixed with the fat all through the tube?

A. It is apt to be. It generally stays in the little portion just below the fat.

Q. You think it would mix down here but not up there?

A. I said it was mixed up there. My experience is this with

the method; that from up here at the top would be a column  
 157 of clear fat, below that a column of fat and fiber mixed together, down in here would be some more fiber that didn't get into the top at all because it was so narrow. This portion would retain some of the fat and this some of the fat. The column that one reads is what is above the rest.

Q. How much do you get a day for testifying?

A. I have no bargain with the gentleman that employed me, but I expect to charge \$50 a day and expenses.

Q. Who are you working for?

A. I was employed by the Lederle Laboratories of New York City.

Defendant rests.

158 JAMES A. EVANS, recalled by Mr. Brooks:

Q. When you made your test what if any difficulty was there in discerning the point at which the butter fat appeared at the neck of the bottle?

A. There was no difficulty; I had a sharp reading, both at the top and bottom. The top part there was no dragging down of the fat down the tube; in fact they are read within half a minute of the time you stop, and the temperature was a few degrees probably above 150, but they were read in such short intervals of time that there is no dragging down and I had a sharp reading at the top. At the bottom I also had a sharp reading. It was a perfectly clear test and perfectly easily read.

Q. What if any fiber was there separate from the fat in the tube at the bottom: in the neck of the bottle?

A. There was no fiber there. It was a clear sharp reading at the point.

Q. Supposing the fiber did get mixed with the fat, what effect would the whirling process have upon that, as to where it would leave it at the time you made your reading?

A. I didn't mean to say there was no fiber mixed with the fat. What I meant to say was this: that as Dr. Smith described, there was first a column of fat at the upper part of the neck and

159 underneath that another column of fiber there and that would read only the one column. There may have been some particles of fiber distributed in the fat. I don't say that was not. If they were they simply increased the volume and made the per centage larger than they otherwise would, but the per centage of fiber in the whole bottle is so small that it is almost negligible, and if there is some distributed through the lower part of the bulb part of the bottle, you cannot see it, as I stated in my testimony yesterday. The liquid is dark colored and you cannot see through it.

Q. You heard Dr. Deghucé testify as to the proportion of fiber being about 1/1100 of the contents of the Babcock bottle: would you say as to that being about right?

Objected to, that Dr. Deghucé testified that if the contents of

bottle was made up in the manner described to him by the attorney then that might be, but he didn't say the contents of the bottle was that.

The Court: I don't know that he did. He said there was about ten per cent. of chocolate, but I understood him to say that perhaps three per cent of the chocolate was fiber.

Question withdrawn.

160 Q. Taking the sample as you put it in, at the time of the final test, that is when you tested it for the butter fat, about what proportion would there be in there of chocolate fiber: about what part of the contents of that bottle would be chocolate fiber?

A. Of course that would depend on the amount of chocolate put into the chocolate ice cream. As Dr. Deghueé said, ten per cent. would be a very liberal amount of chocolate to put in ice cream, and if you take that as a basis the per centage is very small. It would be probably less than one tenth of one per cent in the bottle.

Q. About how much would that be on the neck of that bottle. Just supposing you take the whole bottle: about how much would it be gathered on there: one tenth of one per cent.?

A. One tenth of one per cent. of butter fat gathered on here is half way between those two small lines. That is if the 18 grams were taken to start with. In this case approximately nine grams or a little over nine grams you would have to multiply the reading by two. It would be about the distance between two of the small lines.

Counsel for Commonwealth offers the Babcock bottle in evidence. Objected to.

The Court to Mr. Brooks: Is that the bottle that was used in this case?

161 Mr. Brooks: Both of them were alike.

Mr. Carlin: It is only part of the apparatus. If there is going to be an apparatus offered we would like it all.

The Court: I don't think it is rebuttal.

Cross-examined by Mr. Carlin:

Q. Do you mean to tell the jury that one tenth per cent. of fiber floating around in the liquid would only occupy that amount of space?

The Court: He didn't say fiber. Butter fat.

Q. Then you don't intend to say that relates to the fiber: that the fiber would only occupy that space?

A. That wasn't the question that was asked me. The fiber that occupied that space I cannot tell you. That depends on the mixture of the ice cream how much there was there. It may be the fiber would occupy less than that amount of space.

Q. The fiber floating around in the liquid would be all swelled up?

A. If it is charred it is not swelled very much. If it is charred it is rather contracted instead of swelled, and the strong sulphuric acid tends to char it to some extent.

Q. Would that swell before it was charred?

162 A. It depends on the acid that is used. The charring as soon as the strong sulphuric acid is added there the heat is generated to a great extent above that of the boiling point of water and this strong sulphuric acid with this heat does char those substances.

Q. What about the weak sulphuric acid that you put on first. Doesn't that swell it?

A. That may swell it some. I don't know. But it is charred at the time the final reading is made.

Q. But it is floating around in the liquid?

A. I don't know it is.

Q. I understood you to say yesterday you got a clear reading. Is that right?

A. I said that this morning, that I had a clear reading of the butter fat.

Q. And now to-day you tell us you had two columns: one of fiber and one fat?

A. No sir, I said just the opposite of that.

Q. You hadn't two columns?

A. No sir, I said just the opposite.

Q. Do you say now you didn't have two?

A. I say I didn't have two columns. I had a sharp reading at the top and a sharp one at the bottom.

Q. Was there any fiber in the neck below the fat column?

163 A. I don't think there was. I don't state positively there wasn't but I don't think there was. I didn't see any. The lower part of the bulb is very dark colored from the strong sulphuric acid. It is opaque and you cannot see through it. Above that on the final addition of the water it is rather transparent and you can see through and on top of that is the butter fat and there was a sharp reading between the butter fat and that final addition of hot water and immediately below that column of fat was a water liquid and didn't contain a mass of fiber.

Q. Then the fiber was not on the bottom at your final reading, at the bottom of the bottle?

A. I said I didn't see any there.

Q. Didn't you say yesterday that at the conclusion of the test the fiber was on the bottom of the bottle?

A. No sir.

Q. Are you positive of that?

A. I said the lower part of the bottle was all charred and black and opaque and you cannot see through it. A few little particles of fiber which are microscopic in size in a dark liquor like that you cannot see them.

Q. Did you say in this case there was no fiber?

A. In the bottle altogether?

Q. Yes.

A. No, I certainly didn't say that.

164 Q. Was there any in your fat column?

A. I just said a moment ago there might have been.

Q. You don't know?

A. There certainly wasn't a great deal. If there was it increased the column and made it a larger reading than it was; not a smaller.

Q. Is not the fat column clear so you could see the fiber if there was any in there?

A. No, you cannot see those fibers; they are microscopic sized. They are ground first and small and mixed in the mass; you can't see them; you can't distinguish them singly.

Q. You say they couldn't be seen with the naked eye?

A. They don't float around like a stick of any size whatever.

Q. What temperature do you say you made this reading at? 150

I understood you to say to-day: is that right?

A. No, I said slightly above 150. I said yesterday the temperatures I determined were 150 to 160.

Q. Those temperatures you determined had nothing to do with this sample?

A. Yes sir, they had this much to do with it, they were run in exactly the same way.

Q. In this sample what would you say the temperature was?

A. I presume between 150 and 160.

165 Q. That is merely your presumption?

A. It is borne out by taking identical cream.

Q. Isn't that your presumption as to this sample?

A. No, I don't think so.

Q. Didn't you tell us yesterday your temperature was about eighty centigrade?

A. No sir, you asked me and I said I didn't think it was. I said I made several tests exactly the same and took the temperature and they ranged from 150 to 160. That is just slightly above 150.

Q. Didn't I ask you whether you said 85 centigrade and you said no, you said 80?

A. At the Alderman's hearing I said the temperature we were discussing was 80 and I said it was approximately that by the touch of my hand, but not by the thermometer.

Q. Eighty centigrade is what Fahrenheit?

A. 176.

Q. That is not 150, as you testified this reading was?

A. I didn't testify this reading was 150.

Q. Did you take out this fiber or look in this bottle to make any test whether there was any fiber in there or not?

A. No.

Q. And you are positive now that if there was fiber there that could not be seen with the naked eye and that it could not be seen if it was present in the fat column. Is that true?

A. No, I didn't say that. It might be in sticks big enough to be seen. You can get it in very large chunks, but where it is finely ground like this sample was you would not see it.

Q. You would not say that in a test of a chocolate ice cream a chemist cannot see with the naked eye the fiber?

A. I will say I didn't see the fiber.



Q. You won't say that cannot be seen in other tests?

A. No, I don't say that.

Commonwealth Rests.

Proofs Closed.

### 167 Gentlemen of the Jury:

The defendants, A. W. Crowl and W. F. Lewis, are on trial before you upon an indictment charging them with selling ice cream deficient in butter fat. The indictment was drawn under a section of an act of Assembly which reads like this: "No ice cream shall be sold within the state containing less than eight per centum butter fat, except where fruit or nuts are used for the purpose of flavoring, when it shall not contain less than six per centum of butter fat."

Another section of the Act imposes a penalty: makes the violation of any part of the act a misdemeanor and imposes a penalty therefor.

The first question is: "Did the defendants sell ice cream?" The evidence for the Commonwealth as to that is the evidence of G. M. Pelton, who is an agent of the Dairy and Food Commission of this Commonwealth. He testifies that the defendants have a place of business in the city of Corry in this county and that he went to their place of business on the afternoon of the 21st day of June last and bought of Mr. Crowl, one of the defendants, a half pint of chocolate ice cream and paid for it the sum of fifteen cents and had it put in a glass jar there in the store and that he labeled the glass jar. If you believe that testimony then there was a sale to Mr. Pelton of this article.

Was it ice cream? Mr. Pelton says he bought it for ice cream. His testimony tends to show that it was ice cream, and the testimony of the chemist, Mr. Evans, who analyzed it according to the evidence the same afternoon, also is to the effect that it was ice cream.

It is a sale of ice cream containing less than a certain amount of butter fat which is prohibited. The indictment says that it was not flavored with fruit or nuts. You see this act of assembly says they shall not sell ice cream containing less than eight per cent. butter fat except where fruit or nuts are used for the purpose of flavoring. Now the indictment charges, and had to charge, that this ice cream did not contain fruit or nuts, and the burden is upon the Commonwealth to prove that. You must find, before you convict the defendants, that the ice cream did not contain fruit or nuts as a flavor. Upon that you have the testimony of the chemist, Mr. Evans, that he sampled it, looked at it, tasted it, that it did not have any fruit or nut flavor. I do not know whether Mr. Pelton testified upon that subject or not. Mr. Evans, who is a chemist, says he could tell by the looks whether it had nut flavor and by the taste and smell and that it didn't have, and whether it had fruit flavor, and that it didn't have, and Prof. Ashman, also a chemist called here for the Commonwealth, whose home is in Pittsburg, testifies that by the taste and sight you could discover whether or not it had nuts or fruit

169 flavor. It is necessary for the Commonwealth to prove that



dictment, and it was necessary for the Commonwealth to so allege. If you find that this was ice cream, that the defendants sold it to Mr. Pelton, and that it did not contain nuts or fruit for flavoring, then you will take up the next question. "Did it contain less than eight per centum butter fat?" That would perhaps seem to be the most important question in the case. On that you have the testimony of Mr. Evans, who says he analyzed it that same afternoon, the 21st of June, and he tells you how he analyzed it, by the Babcock method for analyzing milk and cream. The Babcock method seems to be a standard method under the U. S. Government as modified by Dr. Hortvet of Minnesota. Perhaps Dr. Hortvet's modification has reference to the analyzing of ice cream as distinguished from milk or cream.

Now Mr. Evans tells you how he made this analysis. You saw him on the stand and you heard his testimony. He tells you what he did and how he did it, and he says he found 2.7 per cent. of fat, as I recall his testimony, which would be much below the standard. If you believe that his analysis was accurate and that his testimony is truthful, why then from that you would have a right to conclude that it did contain much less than eight per cent. of butter fat.

Dr. Ashman says that the methods which Mr. Evans says he adopted and used in this analysis would produce a substantially correct result. Prof. Ashman says that he has recently analyzed ice cream on the same method, and then also by another method which he explained to you, and that he obtained practically the same result. His testimony would corroborate the testimony of Mr. Evans as to the accuracy of the method used by Mr. Evans.

That Hortvet method as I understand, or Babcock method—Hortvet modification perhaps—is to put the substance that is to be analyzed, the ice cream in this case, into a glass receptacle and put in certain other matters which you heard—acid and water—whatever it was—you will remember the methods and then perhaps at a certain temperature to subject it to a certain whirling motion, which is supposed to separate the butter fat from the balance of the substance; centrifugal motion which throws it in one place—separates it from the mass. You will remember that; it is not for the Court to enlarge upon that method. And Mr. Evans and Prof. Ashman testify that that would produce a correct result.

On behalf of the defense you have the testimony of Dr. Deghuae, of New York and of Dr. Smith of Case School in Cleveland, both chemists of considerable experience according to the testimony, and their testimony is opposite to the testimony of the chemists called here for the Commonwealth. In the first place they say you could not tell whether the ice cream had a fruit or nut flavor in it by looking at it, or by taste or smell; that you ought to subject it to the microscope. You will remember that testimony. Then they also tell you that the method used by Mr. Evans is worthless—that is the effect of their testimony—as applied to ice cream. They say the Babcock test would not be right, or the Hortvet test

would not be right, as applied to chocolate ice cream. They tell you that the proper way to examine chocolate ice cream would be not by this whirling centrifugal motion test, but it would be by extraction or abstracting the fat from the other substances in the ice cream and one of them at least tells you that the operation would take from eighteen to twenty four hours, and should be done by putting in some chemicals and allowing the mixture to stand until the fat would be extracted. That is a proper matter for you to consider. Dr. Smith said that he has recently made a test of chocolate ice cream, as I understand from his testimony, and that by these extraction tests he obtained six and one half per cent. of fat, perhaps of butter fat—you will remember about that—and that he tried the Hortvet test, the test which Professor Evans says he tried, and that he tried it perhaps several times and only got from one and five-tenths to four and one-tenth per cent—that the tests differed to that extent and he says his three other tests that he applied by different methods were substantially the same and made six and one half per cent. He says that the test made by Mr. Evans might be wrong by five or six per cent.; might lack that much getting out all the fat from the mass of material which was subjected to chemical analysis.

Mr. Evans said that he used in extracting the sugar perhaps—extracting at least some substance before he got down to making the test as to the amount of butter fat in the substance—that he used a pipette, which he introduced into this substance, and with which he extracted or took out this sugar—at least some of the substances other than the butter fat. He tells you how he did it and that is a little different from the Hortvet method. I understand the Hortvet method to be to abstract this substance by a syphon, but Mr. Evans said it was a shorter cut and just as good in his opinion to use the pipette, and he says he did use that. The chemists for the defence both tell you that in using that pipette a portion of the substance would be liable to adhere to the pipette or be withdrawn with the pipette and that that would not be a proper way of treating the substance. You will remember that testimony.

They also testify—these experts—that in the use of this kind of bottle some of the fat would collect upon the shoulders of the bottle inside, and that that would not be proper unless you kept it subjected to some hot water test, which you will remember—hot water treatment.

173 Then they also tell you that chocolate has a fiber in which is not dissolved by the acid that was applied, or which Mr. Evans says he applied in making his test; that there would be a fiber of the chocolate, and they tell you that that fiber would perhaps rise at least part way to the top of the bottle, maybe up to the fat, being perhaps heavier than the fat and lighter than the acid and that the fiber being sort of wet and fluffed up and slimy would hold a considerable portion of the fat. You will remember that testimony. And they give those various reasons why in their opinion the test that was made in this case by Mr. Evans is not reliable. The defence asks you to disregard it. Now you will remember all

testimony of the experts, on both sides; the case depends to a considerable extent upon the testimony of the experts.

It is urged here on behalf of the Commonwealth that the amount of the fiber under the evidence was only perhaps about one part in a thousand, in weight, although perhaps more than that in bulk; that it was not large enough to hold any appreciable amount of the oil or butter fat. Prof. Evans says in rebuttal that it would only be a negligible amount; that is, very small, not worth mentioning, in amount.

The experts for the defense say the Babcock test is all right for milk and cream, but that the Babcock test with the Hortvet modification is not right when it comes to examining ice cream which  
174 has a fibrous substance in it, or any substance in it that is not dissolved before the test is made.

It is urged here on behalf of the defense that the Commonwealth should have kept a part of this sample so it might have been produced here in court. Well, that is a matter for the jury to consider. You heard the witnesses for the Commonwealth and the witnesses for the defense; you will have to decide the case according to the testimony. That might be a circumstance proper for you to consider.

Where the evidence of experts is conflicting you should try and arrive at the truth. You saw them, you heard their testimony; you saw Prof. Evans and Dr. Ashman, you saw Dr. Deghuae, and Dr. Smith. Now you must use your own common sense and experience as men and consider the probabilities of the case, the probabilities of the facts to which they testified, their manner of testifying, their apparent frankness or otherwise in the case. They are not interested parties. It is brought out here for the defense that Mr. Evans gets three dollars for each examination that he makes—each analysis—paid by the Commonwealth of Pennsylvania; and it is brought out here on behalf of the Commonwealth on cross examination that Dr. Deghuae is to have \$50 a day and that Dr. Smith expects \$50, although his fees have not been fixed. But you will probably conclude that all these men are trying to tell the truth and if  
175 they do work on either side it is proper they should have a reasonable compensation. Those are matters proper for you to consider in passing upon the testimony.

The defendants ask us to answer certain requests which they submit, which are proper for the Court to answer and which we will now proceed to do.

1st. That the defendants are presumed to be innocent until proven guilty.

Answer: That point is affirmed. When the Court affirms a point it means that the point correctly states the law as the Court understands the law. When we refuse a point it means that it is not correct as a whole, as the Court understands the law.

2nd. That the burden of proof is upon the Commonwealth to establish the guilt of the defendants.

Answer: Affirmed.

3rd. That unless the jury find from the evidence that the defendants are guilty beyond any reasonable doubt the defendants should be acquitted.

Answer: That point is affirmed. The doubt which would justify a jury in acquitting should be a reasonable, well-founded doubt, arising from the evidence. It should not be a mere fanciful doubt, but it should be simply an honest, well founded doubt.

176 you are satisfied beyond such a doubt then you should convict; if you have such a doubt you should acquit. This being a criminal case, before you convict you should be certain to a reasonable certainty that the defendants are guilty. If you feel certain to a reasonable certainty then you haven't any such reasonable doubt. If you are so sure of it that if it were some important matter of your own, that you would be willing to accept the fact as true and act upon it, then that would be sufficient upon which to base a verdict. You should consider the case fairly and see whether you are satisfied beyond such a reasonable doubt. If you have such a doubt then you should acquit; if you have not then convict.

4th. That each and every juror should be satisfied beyond a reasonable doubt of the guilt of the defendants before bringing in a verdict of guilty.

Answer. That point is affirmed. That don't mean that when you go out and first take a vote you must all think alike, but that means that after talking it over and discussing it with your fellow-jurors you must all concur in the verdict. If you find a verdict of guilty it is the verdict of the twelve men, the final deliberate verdict of the twelve men. Of course you all have to agree upon the verdict, whatever it is.

177 5th. That the Act of Assembly under which the indictment is drawn has been repealed by the Act of Assembly of May 13, 1909, and therefore the verdict of the jury must be not guilty.

Answer. That point is refused.

6th. That unless the jury find from the evidence that the product sold was chocolate ice cream the verdict of the jury must be not guilty.

Answer. That point is affirmed. You will have to consider all the evidence in the case on that question and determine whether or not it was chocolate ice cream.

7th. That unless the jury find from the evidence beyond a reasonable doubt that fruit or nuts were not used for flavoring in the product sold the verdict of the jury must be not guilty.

Answer: That point is affirmed, as I have already explained in the general charge.

8th. That if the jury find from the evidence that the guilt or innocence of the defendants depends upon the accuracy or completeness of a chemical analysis of the substance sold, that they should be satisfied beyond any reasonable doubt that said analysis was accurate and complete before convicting the defendants.

178 Answer. That point is refused. It starts out by saying that if it depends upon the accuracy or completeness, then it ends up by saying that they must find it both accurate and complete. If it depends gentlemen upon, and it does depend largely upon, a chemical analysis, before you convict you should be satisfied

beyond a reasonable doubt that that analysis was reliable. We cannot say that you must be satisfied that it was accurate and complete in all its details, but you must be satisfied that it was sufficiently accurate and sufficiently complete to be trustworthy. You must have reliance upon it and that and all the testimony in the case must satisfy you of the guilt of the defendants beyond a reasonable doubt.

Ninth. That unless the jury find beyond any reasonable doubt that the product sold was ice cream, and that it contained less than eight per cent butter fat the verdict of the jury should be not guilty.

Answer. Affirmed.

The defendants' 10th, 11th, 12th, 13th and 14th points are refused.

Gentlemen, if you convict the defendant you have nothing to say as to the costs.

Mr. Crowl was the man who sold this ice cream according 179 to the evidence of Mr. Pelton. Mr. Lewis did not sell it, was not present at the time it was sold. We have some doubt whether he would be liable for such an act committed by Mr. Crowl, and we therefore suggest and request that as to Mr. Lewis your verdict would be not guilty. It was one act and it is not very important whether you convict two men for it or one, and to put that question out of the case we suggest that in the final verdict whatever it is as to Crowl that it should be not guilty as to Lewis. So whatever instructions we have given you you can consider as between the Commonwealth and A. B. Crowl, the defendant, and you may render a verdict of not guilty as to Lewis, whatever the verdict is as to Crowl.

If you find a verdict of guilty as to Crowl you have nothing to say as to the costs, but if you find a general verdict of not guilty—that would be of course as to both defendants—then you will have to dispose of the costs. That you can do by putting the costs upon the county, or you can put the costs upon the defendant, or you may put the costs upon the prosecutor, in which case you must name him. In this case Mr. G. M. Pelton is the prosecutor. He is a public officer and you should not put any costs upon him unless you believe he acted maliciously. If he acted maliciously you would

180 have the right to put the costs upon him, but if he acted in good faith he ought not to pay any costs because he made a mistake, if you find he made a mistake. You can in a proper case divide the costs, in such a proportion as you see fit, between the prosecutor and the defendants, or, as I have said before, you can put the costs upon the county. If you put the costs upon the county you have to put all the costs upon the county; you cannot divide the costs between the county and either of the parties.

But gentlemen, first decide whether or not the defendants are guilty. It is only in case you acquit both defendants that you have anything to say about the costs. First decide as to the guilt or innocence of the defendants. What I say to you about the costs is simply to give you full instructions, and there is no intimation as to what the Court thinks your verdict ought to be; we give you no intimation as to that. It is a matter exclusively for the jury and the responsibility for a correct decision is entirely with the jury.



not with the court. You should remember all the evidence, whether referred to by the court or not. Give it fair consideration. This is an important case. Not only is it important between these particular parties, but it is important to the Commonwealth in general and to the public and also important to the defendants in this case.

We have no doubt you will continue to give it that same careful consideration that you have thus far given the case.

Before verdict and before the jury retire, counsel for defendants except to the charge of the Court and to the answers of the defendants' points insofar as they were not affirmed without qualification, and request that the charge of the court and defendants' points and the answers thereto be reduced to writing from the stenographer's notes and filed of record, which request is granted and an exception noted before verdict.

EMORY A. WALLING, P. J. [SEAL.]

182 Note:

Defendants' 10th, 11th, 12th, 13th and 14th points, which were refused and not read to the jury, were as follows:

10th. That the Act of Assembly under which the indictment is drawn is invalid and unconstitutional and void in that it violates Sec. 1, Article XIV of the Amendments to the Constitution of the United States, and there can be no conviction of the defendants under the same.

11th. That the Act of Assembly under which the indictment is drawn is unconstitutional and void under the Constitution of the State of Pennsylvania and there can be no conviction under the same.

12th. That unless the jury find from the evidence that the prosecution was commenced by the Dairy and Food Commissioner of the State of Pennsylvania the defendants cannot be convicted.

13th. That the evidence offered on the part of the Commonwealth is not sufficient to warrant the jury in finding W. F. Lewis, one of the defendants, guilty.

14th. That under the law and the evidence the verdict of the jury must be not guilty.

183 I hereby certify that the proceedings, evidence and charge, are contained fully and accurately in the notes taken by me on the trial of the above cause, and that this copy is a correct transcript of the same.

CHAR. G. BREVILLIN,  
*Official Stenographer.*

The foregoing record of the proceedings upon the trial of the above cause is hereby approved, and directed to be filed.

EMORY A. WALLING, *Judge.*

Endowment: No. 32, Sept. Session, 1911. Commonwealth vs. A. B. Crowl and W. F. Lewis. Stenographer's Copy. Filed in Clerk of Court's Office, Erie Co., Pa., Jan. 18, 1912. I. E. Briggs, Erie, Pa.



184 THE SUPERIOR COURT OF PENNSYLVANIA,  
County of Allegheny, ss.:

The Commonwealth of Pennsylvania to the Judges of the Court of Quarter Sessions for the County of Erie, Greeting:

We being willing for certain causes, to be certified of the matter of the Appeal of A. B. Crowl from the sentence and judgment of your said Court, at No. 32 of September Sessions, A. D. 1911, wherein Commonwealth of Pennsylvania is Plaintiff and the above named Appellant is Defendant before you, or some of you, depending, do command you, that the record and proceedings aforesaid, with all things touching the same, before the Judges of our Superior Court of Pennsylvania, at a Superior Court to be holden at Pittsburgh, the first Monday of August next, to wit, August 5th A. D. 1912 so full and entire as in your Court before you they remain, you certify and send, together with this Writ, that we may further cause to be done thereupon that which of right and according to the laws of the said State ought.

Witness the Honorable Charles E. Rice, Doctor of Laws, President Judge of our said Superior Court at Pittsburgh, the eighth day of July in the year of our Lord one thousand nine hundred and twelve.

[SEAL.]

GEORGE PEARSON,  
Prothonotary.

To the Honorable the Judges of the Superior Court of the Commonwealth of Pennsylvania, sitting at Pittsburgh:

The record and process, and all things touching the same, so full and entire as before us they remain, we certify and send, as within we are commanded.

EMORY A. WALLING, P. J. [L. s.]

Endorsement: No. 71 of April Term, 1913. Superior Court. Commonwealth of Pennsylvania vs. A. B. Crowl, Appellant. Certiorari to the Court of Quarter Sessions for the County of Erie

185 Returnable the first Monday of August A. D. 1912. Rule on the Appellee, to appear and plead on the Return-day of the Writ. George Pearson Prothonotary. Note—No application for the allowance of special supersedeas will be considered unless Rule 37 of the Superior Court is strictly complied with. Filed Aug. 3, 1912. Superior Court, Fifth District. W. J. Carlin, G. T. Kincaid. Filed in Clerk of Court's Office, Erie Co., Pa., Jul-15, 1912.

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Filed Feb'y 27, 1913.

In the Superior Court of Pennsylvania.

No. 71, April Term, 1913.

COMMONWEALTH

v.

A. B. CROWL.

Appeal Q. S., Erie County.

HENDERSON, J.:

The first proposition presented by the appellant is that the title of the Act of March 24, 1909, does not comply with the requirements of section three of article three of the Constitution of Pennsylvania, in that it does not give sufficient notice of the provisions of Section four of the statute under which the indictment was drawn. The title to the act is: "An Act for the protection of the public health and to prevent fraud and deception in the manufacture, sale, offering for sale, exposing for sale and having in possession with intent to sell, of adulterated or deleterious ice cream; fixing a standard of butter fat for ice cream; providing penalties for the violation thereof and providing for the enforcement thereof." The fourth section provides that: "No ice cream shall be sold within the state containing less than eight per centum of butter fat, except where fruits or nuts are used for the purpose of flavoring, when it shall not contain less than six per centum of butter fat." We need not refer to the numerous cases which hold that it is not necessary that the title to an act be an index of the subjects legislated about. It is sufficient if it comprehend the subject involved and fairly puts the inquirer on notice. This act has a single subject

187     and the title covers it with a comprehensiveness more complete than is usual in legislation. It declares the purpose of the Act and gives notice that penalties are provided for a violation of its terms. One of the things particularly brought to the notice of the reader is that it fixes a standard of butter fat for ice cream, and it was for the violation of the law with reference to this provision that the defendant was convicted. We have no doubt that all of the provisions of the statute are cognate with the title. It is next contended that the enactment is not within the police power of the state in so far as it fixes a standard of butter fat for ice cream. We do not understand that there is any contention that that portion of the fourth section which forbids the manufacture or sale of adulterated or deleterious ice cream is not a proper subject of legislation. We are only concerned, therefore, with the inquiry whether a statute which fixes a standard of quality for ice cream is within the police power. The purpose of the act was to suppress false pretenses and to secure honest dealing in the sale of an article of food. That ice cream is in general use is admitted; that it is largely composed

milk and cream is shown by the evidence in the case. Its name implies the use of cream in its composition and all of the authorities to which the learned counsel for the appellant refers show that milk and cream are constituents in its composition. It enters so largely into the food supply of the public as to have become a proper subject of legislation especially in view of the opportunities which its manufacture affords to practice imposition. In the popular understanding it is largely composed of milk of which butter fat is an important constituent. If by the exercise of ingenuity and the practice of unwarranted thrift a product can be put on the market having the name and appearance of ice cream but lacking the chief element which gives its value as an article of food, a large opportunity would be afforded to dealers in that article to profit by deception and it is the opportunity for such deceit of which the police power takes notice and seeks to take away. It is not necessary that injury has been done or a wrong perpetrated. The possibility that such results may take place warrants legislative intervention under the police power. We are not concerned with the wisdom of legislation under this power. Our inquiry is whether the power exists. Sovereignty is in the people and is expressed through their legislative representatives by enactment of their will into laws. Their authority is general except as restrained by the Constitution of the Commonwealth or the Constitution of the United States, and among legislative capacities one of the largest is the exercise of the police power. It is more fully described than defined, but that it extends to the protection of the lives, health and property of the citizens and to the preservation of good order and the public morals can not be questioned and these objects are to be provided for by such legislation as the discretion of the law making body may deem appropriate. It is not a successful denial of the exercise of these powers to say that the prohibited article is wholesome and not injurious to the consumer. The wholesomeness of the prohibited thing will not render the Act constitutional. The temptation to fraud and adulteration may be considered leading to regulative or prohibitive legislation. If there were not so courts would become the triers of the expediency of such legislation and the authority which the people committed to the legislature would be transferred by judicial action to the courts. Where a statute is clearly and palpably violative of the Constitution it is the duty of the courts to declare it invalid in the respects in which it is repugnant to this supreme law, but the presumptions are all in favor of the validity of legislative enactments and the burden is on him who asserts the contrary to make it clear beyond doubt that the constitutional power has been exceeded. It has been the policy of this state to legislate on the subject of milk and milk products and statutes have been enacted which made it unlawful for any person to sell milk which contained less than a fixed percentage of butter fat and less than a fixed percentage of milk solids; making it unlawful to sell cream which contained less than a fixed percentage of butter fat; which made it unlawful to sell cheese and fixed the percentage of butter fat which the

various classes of cheese should contain; and similar legislation has been enacted in other states: *State v. Campbell*, 64 N. H. 404; *Com. v. Waite*, 11 Allen 264; *State v. Smyth*, 14 R. I. 100. Legislation of a like character is found in the act of May 21, 1901, forbidding the sale of vinegar which contains less than four per cent of absolute acetic acid. If the sale of pure milk containing less than three and one fourth per cent of butter fat may be prohibited it is not apparent why the same principle does not apply to ice cream. Milk is a natural product—wholesome and useful for food. The milk of many cows contains less than three and one fourth per cent of butter fat. The owners of such cattle have a constitutional right to sell the product of their dairies but this right has been held to be subordinate to the public welfare and this welfare demands that a fixed minimum standard of butter fat shall exist in the whole milk sold in this Commonwealth. The known disposition of some dealers to cheat and the opportunity afforded them by the absence of some regulation of the business is the justification of such legis-

190 lation under the police power. Through such laws the consumers have the assurance that that which they buy is what it is called and what it appears to be and the opportunity for imposition in selling an adulterated or inferior article of food for that which is wholesome and of a supposed standard of quality is removed. The integrity of the Act is not affected by the provisions that where fruits and nuts are used for flavoring six per cent of butter fat shall be required in ice cream. It is obvious that the addition of fruits and nuts to a given quantity of ice cream would diminish the percentage of butter fat and it was apparently a consideration of this fact which caused the distinction between ice cream flavored with extracts and that to which nuts or fruits were added. No discrimination is made between individuals or preference given to particular manufacturers by this legislation and no substantial reason is advanced which would make such a regulation destructive of the whole statute.

It is not an objection to the prosecution that it was not commenced by the Dairy and Food Commissioner. That functionary was specially charged with the enforcement of the provisions of the statute but that did not disable any citizen of the Commonwealth from appearing as a prosecutor. The offense is a misdemeanor and a prosecution for a violation of the Act might be instituted by any person inclined so to do.

The appellant further contends that the act under consideration was repealed by the Act of May 13, 1909, relating to food; defining food and providing for the protection of the public health and the prevention of fraud and deception, etc. A comparison of the two

191 Acts shows that the latter contains no provision with reference to the quantity of butter fat necessary in ice cream, nor any provision which is inconsistent with the fourth section of the Act of March 24, 1909, and as there is no express repeal, none arises by necessary implication. An earlier statute is repealed only in those particulars wherein it is clearly inconsistent and irreconcilable with later enactments. The antagonism must be so great as to con-

vince the mind that the last enactment repealed the former. The objects of the two statutes are not the same and if so both can stand, though they may refer to the same subject. Moreover, both of these Acts were passed at the same Session of the Legislature and the latter only a few weeks after the former. Under such circumstances there is a presumption against an implied repeal.

We do not regard the examination suggested in the 12th and 13th assignments as permissible. The evidence of the experts as to the possibility that samples of ice cream taken from different parts of a can might or would exhibit a variation of butter fat content would not aid the jury in determining what were the constituents of the sample which the prosecuting witness bought and which the chemist for the Commonwealth analyzed. Mr. Pelton, a witness for the Commonwealth, testified that he bought a pint of chocolate ice cream from the defendant; that he asked for chocolate ice cream and that the defendant delivered to him a pint of ice cream which had the appearance of chocolate ice cream. It was this pint of ice cream which was analyzed and for the sale of which the defendant was prosecuted. It was shown to have had less than three per cent of butter fat. Theories about what might have been found in some other part of the can from which the witness got his pint would not throw any light on the case. We are unable to obtain a point of view of the case from which we can observe any error in its trial. The case was fairly presented by the learned trial judge and the law expounded in accordance with the principles which govern the case on the undisputed facts.

The assignments are overruled, the judgment is affirmed and the record remitted to the court below to the end that the sentence may be carried into execution.

193 COMMONWEALTH OF PENNSYLVANIA,  
*County of Allegheny, ct:*

I, George Pearson, Proth-notary of the Superior Court of Pennsylvania, sitting at Pittsburgh, the said Court being a Court of Record, do hereby certify that the foregoing is a true and correct copy of the whole and entire opinion in the case of Commonwealth vs. A. B. Crowl at No. 71 April Term, 1913 as full, entire and complete as the same remains on file in the said Superior Court, in the case there stated; and I do hereby further certify that the foregoing has been compared by me with the original record in said cause in my keeping and custody as the Prothonotary of said Court, and that the foregoing is a correct transcript from said record, and of the whole of the original thereof.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at Pittsburgh, in the County of Allegheny, sitting at Pittsburgh, as aforesaid, this 10th day of March in the year of our Lord One Thousand Nine Hundred and thirteen.

[SEAL.]

GEO. PEARSON,

*Prothonotary.*



Endorsement: No. 71 April Term, 1913—Commonwealth vs. A. B. Crowl—Exemplification.

Endorsement: Page 47—No. — — — Term, 1913—Commonwealth vs. A. B. Crowl, Appellant. Petition for Allowance of Appeal from Superior to Supreme Court—Mar. 13, 1913, Petition granted: Per Curiam—Filed Mar. 10, 1913, Supreme Court, W. D. W. J. Carlin, New York, Gerry T. Kincaid, of Kincaid & Kincaid, Attorneys at law, Corry, Pa., Attorneys for Appellant.

194 THE SUPREME COURT OF PENNSYLVANIA,  
*Eastern District, City and County of Philadelphia, ss:*

[SEAL.]

The Commonwealth of Pennsylvania to the Judges of the Court  
Quarter Sessions, County of Erie, Greeting:

Whereas, By virtue of our Writ of Certiorari from our Supreme Court of Pennsylvania for the Eastern District returnable in the same Court on the fourth Monday of April in the year of our Lord one thousand nine hundred and fourteen a record was brought into the same Court, upon appeal by A. B. Crowl, from your sentence & judgment made in the matter of No. 32 September Sessions 1911, wherein Commonwealth of Pennsylvania was plaintiff and the said appellant was defendant.

And it was so proceeded in our said Supreme Court, that the following judgment was made, to wit:

The judgment of the Superior Court is affirmed on the opinion of Judge Henderson.

And the record proceedings thereupon, and all things concerning the same, were (agreeably to the directions of the Act of Assembly in such cases made and provided) ordered by the said Supreme Court to be remitted to the Court Quarter Sessions for the County of Erie aforesaid, as well for execution or otherwise as to justice shall appear: Wherefore we here remit you the Record of the judgment aforesaid and the proceedings thereupon, in order for execution or otherwise, as aforesaid.

Witness the Honorable D. Newlin Fell, Doctor of Laws, Chief Justice of our said Supreme Court at Philadelphia, 26th day of May in the year of our Lord one thousand nine hundred and fourteen

ALFRED B. ALLEN,  
*Deputy Prothonotary.*

Filed in Clerk of Court's Office, Erie Co., Pa., May 28, 1914.

Endorsement: No. 32, September Term, 1911. Q. S. Erie Co.—Superior Court—No. 71, April Term, 1913—No. 272, January Term 1913. Supreme Court—Commonwealth v. A. B. Crowl, Appellant. Remittitur—Att'y \$3.00—Pro — Rem —.



195

In the Supreme Court of Pennsylvania.

— Term, No. —.

In the Superior Court of Pennsylvania.

No. 71, April Term, 1913.

COMMONWEALTH

VS.

A. B. CROWL.

*The Petition of A. B. Crowl.*

To the Honorable the Justices of the Supreme Court of Pennsylvania:

Your petitioner respectfully represents as follows:

First. Your petitioner was the appellant in the above case.

Second. The questions involved in the appeal were:

(a) Is Section 4 of the Act of March 24, 1909, P. L., 63, which provides as follows: "No ice cream shall be sold within the State containing less than eight (8) per centum of butter-fat, except where fruit or nuts are used for the purpose of flavoring, when it shall not contain less than six (6) per centum butter-fat," valid under the Constitution of the Commonwealth of Pennsylvania?

(b) Is Section 4 of the Act of March 24, 1909, P. L., 63, valid under the Constitution of the United States?

(c) Is Section 4 of the Act of March 24, 1909, P. L., 63, a lawful exercise of the police power of the state?

(d) Is a statute prohibiting the sale of ice cream, otherwise unadulterated, containing less than a certain per centum of butter-fat a lawful exercise of the police power of the state?

(e) Has Section 4 of the Act of March 24, 1909, P. L., 63, been repealed by the enactment of the food law approved May 13, 1909?

Third. The Superior Court answered the first four questions in the affirmative and the last in the negative. This is the first case in which the higher courts have been called upon to decide the constitutionality of Section 4 of the Act of March 24, 1909, P. L. 63. Numerous prosecutions have heretofore been commenced, and are now pending, under this Section of the Act, by the agents of the Dairy and Food Commissioner of this State, and it is important to the retail ice cream dealers of Pennsylvania that the constitutionality of this Section of the Act should be finally determined. The defendant, a retail ice cream dealer, not manufacturing his own ice cream was convicted under the above mentioned Section of selling ice cream, otherwise unadulterated, containing less than eight (8) per centum butter-fat.

Fourth. An important principle of the extent of the police power of the state is involved. This is the only case in this or in any other state, which the research of Counsel for Appellant has been able to

find, wherein the higher courts held that an Act of Assembly, fixing a butter-fat standard for ice cream is a lawful exercise of the police power of the state, and in no reported case has the extent of the police power been carried so far.

The opinion of the Superior Court is hereto attached and copies of the paper books in the case are submitted herewith.

Your petitioner prays that this Court may allow an appeal  
197 from the Superior Court to the Supreme Court in this case,  
with the same effect as if originally taken thereto.

And he will ever pray.

A. B. CROWL.

STATE OF PENNSYLVANIA,  
*County of Erie, ss:*

A. B. Crowl, being duly sworn according to law, deposes and says that the facts set forth in the foregoing petition are true to the best of his knowledge and belief.

A. B. CROWL.

Sworn and subscribed to before me, this 8 day of March, 1913.

[SEAL.]

GERRY T. KINCAID,  
*Notary Public.*

My commission expires Jan. 30, 1915.

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In the Superior Court of Pennsylvania.

No. 71, April Term, 1913.

COMMONWEALTH

VS.

A. B. CROWL, Appellant.

And Now, —, the appeal is allowed in the above mentioned case to the Supreme Court, with the same effect as if the appeal had been originally taken thereto.

— — —

99

*Docket Entries.*

272.

January Term, 1913.

Q. S. Erie Co.

272.

COMMONWEALTH, Plaintiff,

v.

A. B. CROWL, Defendant.

Appeal of Defendant.

W. J. Carlin, G. T. Kincaid.

Superior Court.

No. 71, April Term, 1913.

From the Judgment Affirming the Judgment of the Court of  
Quarter Sessions of Erie County.

Appeal from the Superior Court. Filed August 1, 1913.

Eo die, Certiorari exit, ret'ble fourth Monday April, 1914.

August 1, 1913.—Assignments of Error filed.

August 4, 1913.—Record returned and filed.

March 10, 1913.—Petition for allowance of an appeal filed.

March 13, 1913.—Petition granted. Per Curiam.

April 27, 1914.—Argued.

May 22, 1914.—The judgment of the Superior Court is affirmed  
in the opinion of Judge Henderson. Per Curiam.

May 26, 1914.—Remittitur exit and with record sent to Clerk of  
Court Quarter Sessions of Erie Co.

00 In the Supreme Court of Pennsylvania for the Western  
District.

Superior Court of Pennsylvania, Sitting at Pittsburgh.

No. 71, of April Term, 1913.

COMMONWEALTH

vs.

A. B. CROWL.

Enter Appeal on behalf of A. B. Crowl, Defendant, from the judg-  
ment of the Superior Court of Pennsylvania, sitting at Pittsburgh,

as per order of Supreme Court, allowing said Appeal, filed 13th day of March, 1913.

To George Pearson, Proth'y Sup. Ct. W. D.

W. J. CARLIN,  
G. T. KINCAID,  
*Attorneys for Appellant.*

COUNTY OF ERIE, ss:

A. B. Crowl, being duly sworn, saith that the above Appeal is not intended for delay, but because Appellant believe- he has suffered injustice by the Judgment from which the appeal is taken.

A. B. CROWL.

Sworn and subscribed before me this 15th day of March, A. D. 1913.

[SEAL.]

JOHN HANBERGER,  
*Notary Public.*

My Commission Expires Jan. 18, 1917.

Endorsement: No. 272, January Term, 1913—Supreme Court of Pennsylvania—Western District—Commonwealth vs. Crowl, Appellant—Appeal and Affidavit—Filed Mar. 18, 1913, Supreme Court, W. D.—Filed Aug. 1, 1913, in Supreme Court. W. J. Carlin, G. T. Kincaid, Attorneys for Appellant.

201 THE SUPREME COURT OF PENNSYLVANIA,  
*Eastern District, County of Philadelphia, ss:*

[SEAL.]

The Commonwealth of Pennsylvania to the Judges of the Superior Court, Greeting:

Whereas, Commonwealth, Plaintiff, impleaded A. B. Crowl, defendant, in the Court of Quarter Sessions of Erie County, to — Term, 191—, and thereupon it was so proceeded in that judgment was entered in said Court for the said plaintiff and, Whereas, upon appeal to the Superior Court, the said judgment was affirmed as of No. 71, April Term, 1913, and Whereas, thereupon, to wit, on the thirteenth day of March, 1913, upon due cause shown, an appeal to this Court was allowed.

Now, Therefore, We being willing to be certified of the matter of the said appeal, do command you, that the record and proceedings aforesaid, with all things touching the same, before the Justices of our Supreme Court of Pennsylvania, at a Supreme Court to be holden at Philadelphia, in and for the Eastern District, the fourth Monday of April 1914, so full and entire as in your Court before you they remain, you certify and send, together with this Writ, that we may further cause to be done thereupon that which of right and according to the laws of the said State ought —.

Witness the Honorable D. Newlin Fell, Doctor of Laws, Chief Justice of our said Supreme Court, at Philadelphia, the first day of

August in the year of our Lord one thousand nine hundred and thirteen.

ALFRED B. ALLEN,  
*Deputy Prothonotary.*

To the Honorable the Justices of the Supreme Court of the Commonwealth of Pennsylvania, sitting in and for the Eastern District:

The record and process, and all things touching the same, so full and entire as before us they remain, we certify and send, as within we are commanded.

— —. [L S.]  
— —. [L S.]

Filed in Clerk of Court's Office Erie Co. Pa. May 28, 1914.

02      Endorsement: No. 32, September Term, 1911—Q. S. Erie Co.—Superior Court—No. 71, April Term, 1913—No. 272, January Term, 1913—Supreme Court—Commonwealth v. A. B. Crowl, Appellant—Certiorari to the Superior Court. Returnable the fourth Monday of April A. D., 1914. Rule on the Appellee, to appear and plead on the Return-day of the Writ. Alfred B. Allen, Deputy Prothonotary—Filed Aug. 4, 1913, in Supreme Court—W. J. Carlin, G. T. Kincaid, Attorneys for Appellant.

03      Supreme Court of Pennsylvania, Western District.

No. 117, October Term, 1913.

COMMONWEALTH

vs.

A. B. CROWL.

*Assignments of Error to Judgment of the Superior Court.*

First. The Superior Court erred in not sustaining the first assignment of error to the judgment of the Court of Quarter Sessions to wit: "The Court erred in overruling point one of the demurrer of defendant, to wit: 'That the indictment does not charge a crime.' Appendix, page —.) By the Court: Demurrer overruled, to which defendants except- and an exception is sealed." (Paper Book, page —.)

By the Superior Court: The assignments are overruled. (Paper Book, page —.)

Second. The Superior Court erred in not sustaining the second assignment of error to the judgment of the Court of Quarter Sessions to wit: "The Court erred in overruling point two of the demurrer of defendant, to wit, 'That no Act of the General Assembly makes it a crime to sell ice cream containing less than eight per cent. butter fat, as the act approved March 24, 1909, was repealed by the enactment of the so-called pure food law approved May 13, 1909.'

(Appendix, page —.) By the Court: Demurrer overruled to which defendants except and an exception is sealed." Paper Book, page —.)

By the Superior Court: The assignments are overruled. (Paper Book, page —.)

204 Third. The Superior Court erred in not sustaining the third assignment of error to the judgment of the Court of Quarter Sessions to wit: "The Court erred in overruling point four of the demurrer of defendant, to wit, 'That the Food Acts of March 24, 1909, and May 13, 1909, both commit to the Dairy and Food Commissioners the sole power to commence prosecutions, for their violation and are therefore unconstitutional and void under the Constitution of the United States and the Constitution of Pennsylvania.' (Appendix, page —.) By the Court: Demurrer overruled, to which defendants except and an exception is sealed." (Paper Book, page —.)

By the Superior Court: The assignments are overruled. (Paper Book, page —.)

Fourth. The Superior Court erred in not sustaining the fourth assignment of error to the judgment of the Court of Quarter Sessions to wit: "The Court erred in overruling point five of the defendant's demurrer, to wit, 'That the information or complaint and said indictment does not show that the prosecution was commenced by the Dairy and Food Commissioners as required by the Act, but, on the contrary shows that it was not commenced by said official.' (Appendix, page —.) By the Court: Demurrer overruled, to which defendants except and an exception is sealed." (Paper Book, page —.)

By the Superior Court: The assignments are overruled. (Paper Book, page —.)

Fifth. The Superior Court erred in not sustaining the fifth assignment of error to the judgment of the Court of Quarter Sessions to wit:—"The Court erred in overruling point nine of the 205 defendants' demurrer, to wit, 'That the Act under which the charge is made is invalid, unconstitutional and void in that it violates Section 1, Article XIV of the Amendment to the Constitution of the United States in that it abridges the privileges and immunities of citizens of the United States and deprives them of liberty and property without due process of law and denies them the equal protection of the law.' (Appendix, page —.) By the Court: Demurrer overruled, to which defendants except and an exception is sealed." (Paper Book, page —.)

By the Superior Court: The assignments are overruled. (Paper Book, page —.)

Sixth. The Superior Court erred in not sustaining the sixth assignment of error to the judgment of the Court of Quarter Sessions to wit: "The Court erred in overruling point ten of the defendant's demurrer, to wit, 'That the Act under which the charge is made is unconstitutional and void under the Constitution of Pennsylvania.' (Appendix, page —.) By the Court: Demurrer overruled, to which defendants except and an exception is sealed." (Paper Book, page —.)



By the Superior Court: The assignments are overruled. (Paper Book, page —.)

Seventh. The Superior Court erred in not sustaining the seventh assignment of error to the judgment of the Court of Quarter Sessions to wit: "That the Court erred in refusing to charge defendants' fifth point, to wit, 'That the Act of Assembly under which the indictment is drawn has been repealed by the Act of Assembly of May 13, 1900, and therefore the verdict of the jury must be not guilty.' Answer. That point is refused. (Paper Book, page —.) Before verdict and before the jury retired, counsel for the defendants except to the charge of the Court and to the answers of the defendants' points in so far as they are not affirmed without qualification and request that the charge of the Court and defendants' points and the answers thereto be reduced to writing from the stenographer's notes and file of record, which request is granted and an exception noted before verdict." (Paper Book, page —.)

By the Superior Court: The assignments are overruled. (Paper Book, page —.)

Eighth. The Superior Court erred in not sustaining the eighth assignment of error to the judgment of the Court of Quarter Sessions to wit: "That the Court erred in refusing defendants' sixth point, to wit, 'That the Act of Assembly under which the indictment is drawn is invalid and unconstitutional and void in that it violates Section 1, Article XIV of the Amendments to the Constitution of the United States, and there can be no conviction of the defendants under the same.' (Paper Book, page —.) Before verdict and before the jury retired, counsel for the defendants except to the charge of the Court and to the answers of the defendants' points in so far as they are not affirmed without qualification and request that the charge of the Court and defendants' points and the answers thereto be reduced to writing from the stenographer's notes and file of record, which request is granted and an exception noted before verdict." (Paper Book, page —.)

By the Superior Court: The assignments are overruled. (Paper Book, page —.)

Ninth. The Superior Court erred in not sustaining the ninth assignment of error to the judgment of the Court of Quarter Sessions to wit: "That the Court erred in refusing defendants' seventh point, to wit, 'That the Act of Assembly under which the indictment is drawn is unconstitutional and void under the Constitution of the State of Pennsylvania and there can be no conviction under the same.' (Paper Book, page —.) Before verdict and before the jury retired, counsel for the defendants except to the charge of the Court and to the answers of the defendants' points in so far as they are not affirmed without qualification and request that the charge of the Court and defendants' points and the answers thereto be reduced to writing from the stenographer's notes and file of record, which request is granted and an exception noted before verdict." (Paper Book, page —.)

By the Superior Court: The assignments are overruled. (Paper Book, page —.)

Tenth. The Superior Court erred in not sustaining the tenth assignment of error to the judgment of the Court of Quarter Sessions to wit: "That the Court erred in refusing defendants' twelfth point, to wit, 'That unless the jury find from the evidence that the prosecution was commenced by the Dairy and Food Commissioner of the State of Pennsylvania the defendants cannot be convicted.'" (Paper Book, page —.) Before verdict and before the jury retired, counsel for the defendants except to the charge of the Court and to the answers of the defendants' points in so far as they are not affirmed without qualification and request that the charge of the Court and defendants' points and the answers thereto be reduced to writing from the stenographer's notes and file of record, which request is granted and an exception sealed before verdict." (Paper Book, page —.)

By the Superior Court: The assignments are overruled. (Paper Book, page —.)

285 Eleventh. The Superior Court erred in not sustaining the eleventh assignment of error to the judgment of the Court of Quarter Sessions to wit: "That the Court erred in refusing defendants' fourteenth point, to wit, 'That under the law and the evidence the verdict of the jury must be not guilty.'" (Paper Book, page —.) Before verdict and before the jury retired, counsel for the defendants except to the charge of the Court and to the answers of the defendants' points in so far as they are not affirmed without qualification and request that the charge of the Court and defendants' points and the answers thereto be reduced to writing from the stenographer's notes and file of record, which request is granted and an exception sealed before verdict." (Paper Book, page —.)

By the Superior Court: The assignments are overruled. (Paper Book, page —.)

Twelfth. The Superior Court erred in not sustaining the twelfth assignment of error to the judgment of the Court of Quarter Sessions to wit: "The Court erred in refusing to permit defendants to prove that samples taken from different parts of the same can would show different percentages of butter fat. This is shown by the following question: 'Would it be possible from the same can, taking a sample at the edge, another at the center and another at the lowest strata, to get three different samples that would vary as much as seven or eight points, if it was a five gallon can?' Objected to as not cross examination. The Court: 'I don't believe that is cross examination. It may be competent in rebuttal to show that, but I do not think it is cross examination. Objection sustained and exception sealed for defendants.'" (Appendix page —.)

290 By the Superior Court: The assignments are overruled. (Paper Book, page —.)

Thirteenth. The Superior Court erred in not sustaining the thirteenth assignment of error to the judgment of the Court of Quarter Sessions to wit: "The Court erred in rejecting and excluding the testimony of Dr. Dugham, who had been duly qualified as an ex-

part, as to the variation in butter fat content of samples taken from different portions of the same can. This is shown by the following question, 'What would you say, taking a five gallon can, as to the variation of the top of the can with the bottom; how high would it run in percentage of fat?' Objected to as immaterial, the evidence upon the part of the Commonwealth shows the sale of this pint of ice cream; that it is not material to show what there might have been in some other part of the can or in some other part of the store. The Court: In our opinion the only evidence the Commonwealth having offered being in regard to the half pint bought by Mr. Pelton, it is not material to show that different parts of a larger can of ice cream would show a greater amount of butter fat than others. It is a question as to the sample or as to the amount sold by the defendants or one of the defendants to the prosecutor. The objection is sustained, evidence excluded and an exception sealed for the defendants." (Appendix, page —.)

By the Superior Court: The assignments are overruled. (Paper Book, page —.)

Fourteenth. The Superior Court erred in not sustaining the fourteenth assignment of error to the judgment of the Court of Quarter Sessions to wit: "The Court erred in charging the jury as follows 'Was it ice cream? Mr. Pelton says he bought it for ice cream. His testimony tends to show that it was ice cream, and the testimony of the chemist, A. J. Moon, who analyzed it according to the evidence the same afternoon, also is to the effect that it was ice cream.'" (Paper Book, page —.)

By the Superior Court: The assignments are overruled. (Paper Book, page —.)

Fifteenth. The Superior Court erred in not sustaining the fifteenth assignment of error to the judgment of the Court of Quarter Sessions to wit: "That the Court erred in overruling the second point of defendants' motion in arrest of judgment, to wit, 'That no Act of the General Assembly of Pennsylvania makes it a crime to sell ice cream containing less than eight (8) per cent of butter fat, as the Act approved March 24, 1909, was repealed by the enactment of the so-called Pure Food Law, approved May 13, 1909.'" (Appendix page —). This is shown by the following order: "And, now June 24, 1912, the rule for new trial and also the rule in arrest of judgment in above stated case are discharged. To which same does the defendant except and an exception is sealed.'" (Paper Book, page —.)

By the Superior Court: The assignments are overruled. (Paper Book, page —.)

Sixteenth. The Superior Court erred in not sustaining the sixteenth assignment of error to the judgment of the Court of Quarter Sessions to wit: "That the Court erred in overruling the third point of defendants' motion in arrest of judgment to wit: 'That the indictment does not contain a specific description of the offense, and does not describe the offense so that the defendant may know how to answer and that a conviction or acquittal might be pleaded in

bar to another indictment for the same offense.' (Appendix, page —). And now June 24, 1912, the rule for new trial and also the rule in arrest of judgment in above stated case are discharged. To which same does the defendant except and an exception is sealed." (Paper Book, page —.)

By the Superior Court: The assignments are overruled. (Paper Book, page —).

Seventeenth. The Superior Court erred in not sustaining the seventeenth assignment of error to the judgment of the Court of Quarter Sessions to wit: "That the Court erred in overruling the fourth point of defendants' motion in arrest of judgment, to wit, 'That the food Acts of March 24, 1909, and May 1909, both commit to the Dairy and Food Commissioner the sole power to commence prosecutions for the violation of the same and are therefore unconstitutional and void under the Constitution of the United States and the Constitution of Pennsylvania.' (Appendix, pages —). And now, June 24, 1912, the rule for new trial and also the rule in arrest of judgment in above stated case are discharged. To which same does the defendant except and an exception is sealed." (Paper Book, page —).

By the Superior Court: The assignments are overruled. (Paper Book, page —).

Eighteenth. The Superior Court erred in not sustaining the eighteenth assignment of error to the judgment of the Court of Quarter Sessions to wit: "That the Court erred in overruling the fifth point of defendants' motion in arrest of judgment, to wit, 'That neither the complaint nor indictment shows that the prosecution was commenced by the Dairy and Food Commissioner, as required by the Act; nor by his direction, or by any one in his employ, but on the contrary shows that it was not commenced by said official.' (Appendix, page —). And now, June 24, 1912, the rule for new trial and also the rule in arrest of judgment in above stated case are discharged. To which same does the defendant except and an exception is sealed." (Paper Book, page —.)

By the Superior Court: The assignments are overruled. (Paper Book, page —).

Nineteenth. The Superior Court erred in not sustaining the nineteenth assignment of error to the judgment of the Court of Quarter Sessions to wit: "That the Court erred in overruling the sixth point of defendants' motion in arrest of judgment, to wit, 'That the indictment is too definite on which to sustain a conviction in that it charges that said defendants did sell, offer for sale, expose for sale, and have in possession with intent to sell, ice cream which violates section 4 of the Act of Assembly, approved March 24, 1909. Whereas the provisions of Section 1 of said Act, making it an offense to offer for sale, expose for sale, and have in possession with intent to sell, apply to the 2nd Section of said Act, and not to the 4th Section of the same.' (Appendix, page —). And now, June 24, 1912, the rule for new trial and also the rule in arrest of judgment in above stated case are discharged. To which same does the

defendant except and an exception is sealed." (Paper Book, page —.)

By the Superior Court: The assignments are overruled. (Paper Book, page —.)

Twentieth. The Superior Court erred in not sustaining the twentieth assignment of error to the judgment of the Court of Quarter Sessions to wit: "That the Court erred in overruling the seventh point of defendants' motion in arrest of judgment, to wit,

213 "That the Act of Assembly of March 24, 1909, known as the Ice Cream Act, in that it attempts in Section 4 of the same, to establish a standard for butter fat in ice cream, and absolutely prohibits the sale of ice cream containing less than the standard of butter fat, no matter how wholesome, is unconstitutional." (Appendix, page —). And now, June 24, 1912, the rule for new trial and also the rule in arrest of judgment in above stated case are discharged. To which same does the defendant except and an exception is sealed." (Paper Book, page —.)

By the Superior Court: The assignments are overruled. (Paper Book, page —.)

Twenty-first. The Superior Court erred in not sustaining the twenty-first assignment of error to the judgment of the Court of Quarter Sessions to wit: "That the Court erred in overruling the eighth point of defendants' motion in arrest of judgment, to wit, That the Act under which the indictment is drawn is invalid and unconstitutional and void in that it violates Section 1, Article 14, of the amendments to the Constitution of the United States, in that it abridges the privileges and immunities of citizens of the United States and deprives them of liberty and property without due process of law and denies them the equal protection of the law." (Appendix, pages —). And now, June 24, 1912, the rule for new trial and also the rule in arrest of judgment in above stated case are discharged. To which same does the defendant except and an exception is sealed." (Paper Book, page —.)

By the Superior Court: The assignments are overruled. (Paper Book, page —.)

Twenty-second. The Superior Court erred in not sustaining the twenty-second assignment of error to the judgment of the Court of

214 Quarter Sessions to wit: "That the Court erred in overruling the ninth point of defendants' motion in arrest of judgment, to wit, 'That the Act under which the indictment is drawn is unconstitutional and void under the Constitution of Pennsylvania.' (Appendix, page —). And now, June 24, 1912, the rule for new trial and also the rule in arrest of judgment in the above stated case are discharged. To which same does the defendant except and an exception is sealed." (Paper Book, page —.)

By the Superior Court: The assignments are overruled. (Paper Book, page —.)

GERRY KINCAID,  
*Attorney for Defendant.*

WALTER JEFFREYS CARLIN,  
*Of Counsel.*

Endorsement: No. 272, Jan. Term, 1913. Supreme Court of Pennsylvania, Western District. Commonwealth vs. A. B. Crowl. Assignments of Error. Filed Aug. 1, 1913, in Supreme Court. Filed Mar. 29, 1913, Supreme Court, W. D. Kincaid & Kincaid, Attorneys-at-law, Corry, Pa.

215 In the Supreme Court of Pennsylvania, Eastern District.

No. 272, January Term, 1913.

COMMONWEALTH

v.

CROWL.

Appeal from Superior Court. (Q. S., Erie County.)

Filed May 22, 1914.

PER CURIAM:

The judgment of the Superior Court is affirmed on the opinion of Judge Henderson.

216 Supreme Court of the United States.

A. B. CROWL

VS.

COMMONWEALTH OF PENNSYLVANIA.

*Petition for Writ of Error.*

Considering himself aggrieved by the final decision of the Supreme Court of Pennsylvania in rendering judgment against him in the above entitled case, the said A. B. Crowl hereby prays a writ of error from said decision and judgment, to the Supreme Court of the United States and that an order be made fixing the amount of the supersedeas bond.

Assignments of error herewith.

WALTER JEFFREYS CARLIN,  
*Attorney for Appellant, Petitioner.*

SUPREME COURT OF THE UNITED STATES, ss:

Let the writ of error issue upon the execution of a bond by the said A. B. Crowl to the Commonwealth of Pennsylvania in the sum of Five Hundred Dollars: such bond when approved to act as supersedeas.

Dated October 5th, 1914.

MAHLON PITNEY,  
*Associate Justice of the Supreme Court of the United States.*



216½ [Endorsed:] Supreme Court of the United States. A. B. Crowl vs. Commonwealth of Pennsylvania. Original. Petition for Writ of Error. Walter Jeffreys Carlin, Attorney for Appellant Petitioner, 2 Rector Street, New York City, Borough of Manhattan.

217

Copy.

UNITED STATES OF AMERICA, ss:

[SEAL.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Pennsylvania, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Pennsylvania before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The Commonwealth of Pennsylvania and A. B. Crowl and W. F. Lewis, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein any title, right, privilege, or immunity was claimed under the

218 Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision was against the title, right, privilege, or immunity especially set up or claimed under such Constitution, treaty, statute, commission, or authority; a manifest error hath happened to the great damage of the said A. B. Crowl as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the fifth day of October, in the year of our Lord one thousand nine hundred and fourteen.

(Signed)

JAMES D. MAHER,

*Clerk of the Supreme Court of the United States.*

Allowed by

(Signed)

MAHLON PITNEY,

*Associate Justice of the**Supreme Court of the United States.*

[Endorsed:] Supreme Court of the United States. October 191-. A. B. Crowl vs. Commonwealth of Pennsylvania. Writ of Error.

219 Know all Men by these Presents, That we, A. B. Crowl, principal, and the Fidelity and Deposit Company of Maryland, a corporation of the State of Maryland, duly authorized to transact the business of indemnity and suretyship in the State of Pennsylvania, as surety, are held and firmly bound unto the Commonwealth of Pennsylvania in the full and just sum of Five hundred dollars, to be paid to the said Commonwealth of Pennsylvania by its certain attorney, executors, administrators, or assigns: to the payment, well and truly to be made, we bind ourselves, our executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this Twentieth day of October, the year of our Lord one thousand nine hundred and fourteen.

Whereas, lately at a term of the Supreme Court of the Eastern District of Pennsylvania in a suit depending in said Court, between the Commonwealth of Pennsylvania, Appellee, and A. B. Crowl, Appellant, a judgment was rendered against the said A. B. Crowl and said A. B. Crowl, plaintiff in error, (appellant below) having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, citation directed to the said Commonwealth of Pennsylvania to appear and admonishing it to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof.

Now, the condition of the above obligation is such, That said A. B. Crowl, plaintiff in error, shall prosecute his writ of error to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

A. B. CROWL, [SE]  
FIDELITY AND DEPOSIT COMPANY  
OF MARYLAND, [SE]  
By HUGH M. ALLWOOD, [SE]  
*Attorney-in-Fact.*

Attest:  
JAMES R. KINGSLEY,  
*Attorney-in-Fact.*

Sealed and delivered in presence of—

\_\_\_\_\_  
\_\_\_\_\_

Approved by—

\_\_\_\_\_

*Associate Justice of the Supreme  
Court of the United States.*

220 STATE OF NEW YORK,  
County of New York, ss:

On the 20th day of October, in the year 1914, before me personally came Hugh M. Allwood, to me known, who, being by me duly sworn, did depose and say, that he resides in the City of New York; that he is the Attorney-in-Fact of the Fidelity and Deposit Company of Maryland, the corporation described in, and which executed the within instrument; that he knows the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order; and that the Fidelity and Deposit Company of Maryland has been duly authorized to transact business in the State of New York, in pursuance of the statutes in such case made and provided; and that the liabilities of said Company do not exceed its assets as ascertained in the manner provided in Section 183, of the Insurance Law, constituting Chapter 33 of the Consolidated Laws of the State of New York. And the said Hugh M. Allwood further said that he is acquainted with James R. Kingsley and knew him to be the Attorney-in-Fact of said Company; that the signature of the said James R. Kingsley subscribed to the within instrument, was in the genuine handwriting of the said James R. Kingsley and was subscribed thereto by like order of the Board of Directors, and in the presence of him, the said Hugh M. Allwood.

[Seal Fannie A. Massey, Notary Public, New York County.]

F. A. MASSEY,  
Notary Public, New York County, No. 2395.

At a regular meeting of the Board of Directors of the Fidelity and Deposit Company of Maryland, held in its office in the City of Baltimore, State of Maryland, on the 4th day of October, 1911, the following resolution was unanimously adopted:

"Resolved, That Henry B. Platt, Vice-President, James R. Kingsley, Attorney, Frank H. Platt, Edward T. Platt, Joseph A. Flynn, Hugh M. Allwood, Charles V. R. Marsh, Ernest L. Hicks and Frank A. Eickhoff, all of the City of New York, State of New York, be and each of them is, hereby appointed Attorney-in-Fact of this Company and empowered to execute and deliver and attach the seal of the Company to any and all bonds or undertakings for or on behalf of this Company, in its business of guaranteeing the fidelity of persons holding places of public or private trust and the performance of contracts other than insurance policies, and executing or guaranteeing bonds or undertakings required or permitted in all actions or proceedings, or by laws required, permitted or allowed.

"Such bonds or undertakings to be executed for the Company by any one of the said Henry B. Platt, James R. Kingsley, Frank H. Platt, Edward T. Platt, Joseph A. Flynn, Hugh M. Allwood, Charles V. R. Marsh, Ernest L. Hicks or Frank A. Eickhoff, and to be attested in every instance by one other of the said Attorneys-in-Fact, as occasion may require."

## COUNTY OF NEW YORK, ss:

I, James R. Kingsley, Attorney-in-Fact of the Fidelity and Deposit Company of Maryland, have compared the foregoing Resolution with the original thereof, as recorded in the Minute Book of said Company, and do hereby certify that the same is a true and correct transcript therefrom, and of the whole of the said original Resolution. Given under my hand and the seal of the Company, at the City of New York, this 20th day of October, 1914.

[Seal Fidelity & Deposit Company of Maryland, incorporated 1880.]

JAMES R. KINGSLEY,  
*Attorney-in-Fact.*

## Fidelity and Deposit Company of Maryland.

Statement June 30, 1914.

## Resources.

Home Office Building, Charles and Lexington Streets .....	\$2,375,000.00
Other Real Estate, 214 N. Charles St., etc. ....	128,636.88
Bonds and Stocks .....	6,228,578.62
First Mortgage Loans .....	109,034.00
Agents' Debit Balances, Gross (Surety) .....	805,338.02
Agents' Debit Balances, Gross (Casualty) .....	850,406.41
Bank Deposits for use of Branch Offices .....	99,991.45
Cash in Banks and Trust Companies .....	1,133,122.16
Total .....	\$11,730,107.54

## Liabilities.

Reserve for Unearned Premiums .....	\$3,383,203.31
Reserve for Claims, Admitted and Unadmitted .....	1,950,777.50
Reserve for Agents' Commission .....	387,805.51
Reserve for Premium Taxes, & Expenses in Transit .....	173,972.68
Reserve for Liquidation of American Bonding Company .....	82,206.24
Reserve for Liquidation of Philadelphia Casualty Company .....	58,114.44
Reserve for Unpaid Reinsurance Premiums .....	26,215.28
Capital Stock .....	\$3,000,000.00
Surplus .....	2,000,000.00
Undivided Profits .....	667,812.58
Surplus to Policyholders .....	5,667,812.58
Total .....	\$11,730,107.54

STATE OF NEW YORK,  
County of New York, ss:

James R. Kingsley being duly sworn, says that he is the Attorney-in-Fact of the Fidelity and Deposit Company of Maryland, that the foregoing is a true and correct statement of the financial condition of said Company, as of June 30, 1914, to the best of his knowledge and belief, and that the financial condition of said Company is as favorable now as it was when such statement was made.

JAMES R. KINGSLEY.

Subscribed and sworn to before me, this 20<sup>th</sup> day of October, 1914.

[Seal Fannie A. Massey, Notary Public, New York County.]

F. A. MASSEY,

*Notary Public, New York County, No. 2395.*

220½ [Endorsed:] Supreme Court, Eastern Dist. of Pennsylvania. Between: Commonwealth of Pennsylvania and A. B. Crowl. Bond. I approve of the within Bond and of the sufficiency of the surety therein. Dated Oct. 26, 1914. Mahlon Pitney, Associate Justice of the Supreme Court of the United States.

221 UNITED STATES OF AMERICA, ss:

To the Commonwealth of Pennsylvania, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Supreme Court of the United States wherein A. B. Crowl is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Mahlon Pitney, Associate Justice of the Supreme Court of the United States, this fifth day of October, in the year of our Lord one thousand nine hundred and fourteen.

MAHLON PITNEY,

*Associate Justice of the Supreme Court  
of the United States.*

ERIE, PA., October 22, 1914.

I, attorney of record for the Defendant-in-error in the above entitled case hereby acknowledge due service of the above citation and enter an appearance in the Supreme Court of the United States.

J. ORIN WAIT,

*Attorney for the Commonwealth of Pennsylvania.*



222

## Supreme Court of the United States.

A. B. CROWL, Plaintiff in Error,

VS.

COMMONWEALTH OF PENNSYLVANIA, Defendant in Error.

*Assignments of Error.*

Now comes the above named plaintiff in error (defendant appellant below) and files herewith his petition for a writ of error and says that there are errors in the records and proceeding in the above case entitled below as the Commonwealth of Pennsylvania against A. B. Crowl, appellant, and for the purpose of having the same reviewed in the Supreme Court of the United States, makes the following assignments:

The Supreme Court of Pennsylvania erred in holding and deciding that the Act of March 24, 1909, of the General Assembly of the Commonwealth of Pennsylvania, being Public Law 63 of said State and particularly Section 4 of said Act which act is commonly known as the ice cream act, was constitutional and valid. The validity of such section 4 of said Act was denied and drawn in question by the plaintiff in error (defendant appellant below) on the ground of it being repugnant to the Constitution of the United States and in contravention thereof.

The said errors are more particularly set forth as follows:

The Supreme Court of Pennsylvania erred in holding and deciding:

First. That the act of March 24, 1909, of the General Assembly of the Commonwealth of Pennsylvania, did not abridge the privileges and immunities of citizens or of the plaintiff in error (defendant below), nor deprive him of liberty or property without due process of law, nor deny to him the equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Second. That the act of March 24, 1909, of the General Assembly of the Commonwealth of Pennsylvania, did not abridge the privileges and immunities of citizens or of the plaintiff in error (defendant below) nor deprive him of his liberty or property in prohibiting the sale of ice cream under its own name, unless the said ice cream contained the percentage of butter fat required by section 4 of the said act.

Third. That the act of March 24, 1909, of the General Assembly of the Commonwealth of Pennsylvania, did not abridge the privileges and immunities of citizens or of the plaintiff in error (defendant below) nor deprive him of his liberty or property in prohibiting the sale of ice cream either under the name of ice cream or under any other name unless the said ice cream contain the percentage of butter fat required by section 4 of the said act.

Fourth. That the act of March 24, 1909, of the General Assembly of the Commonwealth of Pennsylvania and particularly section



thereof, did not establish an arbitrary classification and did not deny the plaintiff in error (defendant below) the equal protection of the law as guaranteed by the Fourteenth Amendment to the Constitution of the United States, in prohibiting the sale of ice cream under any name unless the said ice cream contain the amount of butter fat specified in said section of said act and in dividing ice cream  
 224 into two classes, one of which contains fruit or nuts for the purpose of flavoring and the other which did not contain such fruit or nuts for flavoring, and requiring 8 per cent. of butter fat where fruit or nuts were not used for flavoring purposes and 6 per cent. where they were.

Fifth. That the act of March 24, 1909, of the General Assembly of the Commonwealth of Pennsylvania, was not an arbitrary and unreasonable regulation and interference with a lawful business and did not abridge the privileges and immunities of the plaintiff in error (defendant below) nor deprive him of his liberty or property as guaranteed to him by the Fourteenth Amendment to the Constitution of the United States.

Sixth. That the Legislature of the State had the right under the Police Power to prohibit the sale of a wholesome article of food which was not a substitute for or an imitation of another product and absolutely prohibited the sale of such article of food, to wit, ice cream, unless the product conform to and contain the specified percentage of butter fat that section 4 of the act of March 24, 1909, of the General Assembly of the Commonwealth of Pennsylvania required and that the said act in so providing did not abridge the privileges and immunities of the plaintiff in error (defendant below) and deprive him of his liberty or property as guaranteed to him under the Fourteenth Amendment to the Constitution of the United States.

For which errors the plaintiff in error (defendant below), A. B. Crowl, prays that the said judgment of the Supreme Court of  
 225 the Commonwealth of Pennsylvania dated and filed May 22, 1914, be reversed and a judgment rendered in favor of the plaintiff in error and for costs.

WALTER JEFFREYS CARLIN,  
*Attorney for Plaintiff in Error.*

225½ [Endorsed:] Supreme Court of the United States. A. B. Crowl, Plaintiff in Error, vs. Commonwealth of Pennsylvania, Defendant in Error. Original. Assignments of Error. Walter Jeffreys Carlin, Attorney for Plaintiff in Error, 2 Rector Street, Borough of Manhattan, New York City.

226 I, D. Newlin Fell, Chief Justice of the Supreme Court of Pennsylvania, do hereby certify, That Alfred B. Allen was, at the time of signing the annexed attestation, and now is, Deputy Prothonotary of the said Supreme Court of Pennsylvania, in and for the Eastern District, to whose acts, as such, full faith and credit are and ought to be given; and that the said attestation is in due form. In Witness Whereof, I have hereunto subscribed my name this

twenty-ninth day of October one thousand nine hundred and fourteen.

[Seal of the Supreme Court of Pennsylvania, Eastern District, 1776.]

D. NEWLIN FELL.

I, Alfred B. Allen, Deputy Prothonotary of the Supreme Court of Pennsylvania, in and for the Eastern District, do certify, That the Honorable D. Newlin Fell by whom the foregoing Certificate was made and given, was, at the time of making and giving the same, and is now, Chief Justice of the Supreme Court of Pennsylvania; to whose acts, as such, full faith and credit are and ought to be given, as well in Courts of Judicature as elsewhere; and that his signature, thereunto subscribed, is genuine.

In Testimony Whereof, I have hereunto set my hand and affixed the Seal of the said Supreme Court of Pennsylvania, in and for the Eastern District, at Philadelphia, this 29th day of October one thousand nine hundred and fourteen.

[Seal of the Supreme Court of Pennsylvania, Eastern District, 1776.]

ALFRED B. ALLEN,  
*Deputy Prothonotary.*

227 STATE OF PENNSYLVANIA,  
*Philadelphia County:*

I, Alfred B. Allen, Deputy Prothonotary of the Supreme Court of Pennsylvania, do hereby certify that the above and foregoing is a true copy of the Record in the above entitled cause, as full and entire as appears of Record in said Court.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said Court at Philadelphia, this twenty-ninth day of October, A. D. 1914.

[Seal of the Supreme Court of Pennsylvania, Eastern District, 1776.]

ALFRED B. ALLEN,  
*Deputy Prothonotary.*

Entered on error: File No. 24,434. Pennsylvania Supreme Court. Term No. 275. A. B. Crowl, plaintiff in error, vs. The Commonwealth of Pennsylvania. Filed November 2d, 1914. File No. 24,434.

UNITED STATES COURT,

F I L E D

OCT 5 1915

JAMES D. MAH

CO

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In the  
**Supreme Court of the United States**

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October Term, 1915.

No.  50

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A. B. CROWL, *Plaintiff in Error,*

vs.

THE COMMONWEALTH OF PENNSYLVANIA,  
*Defendant in Error.*

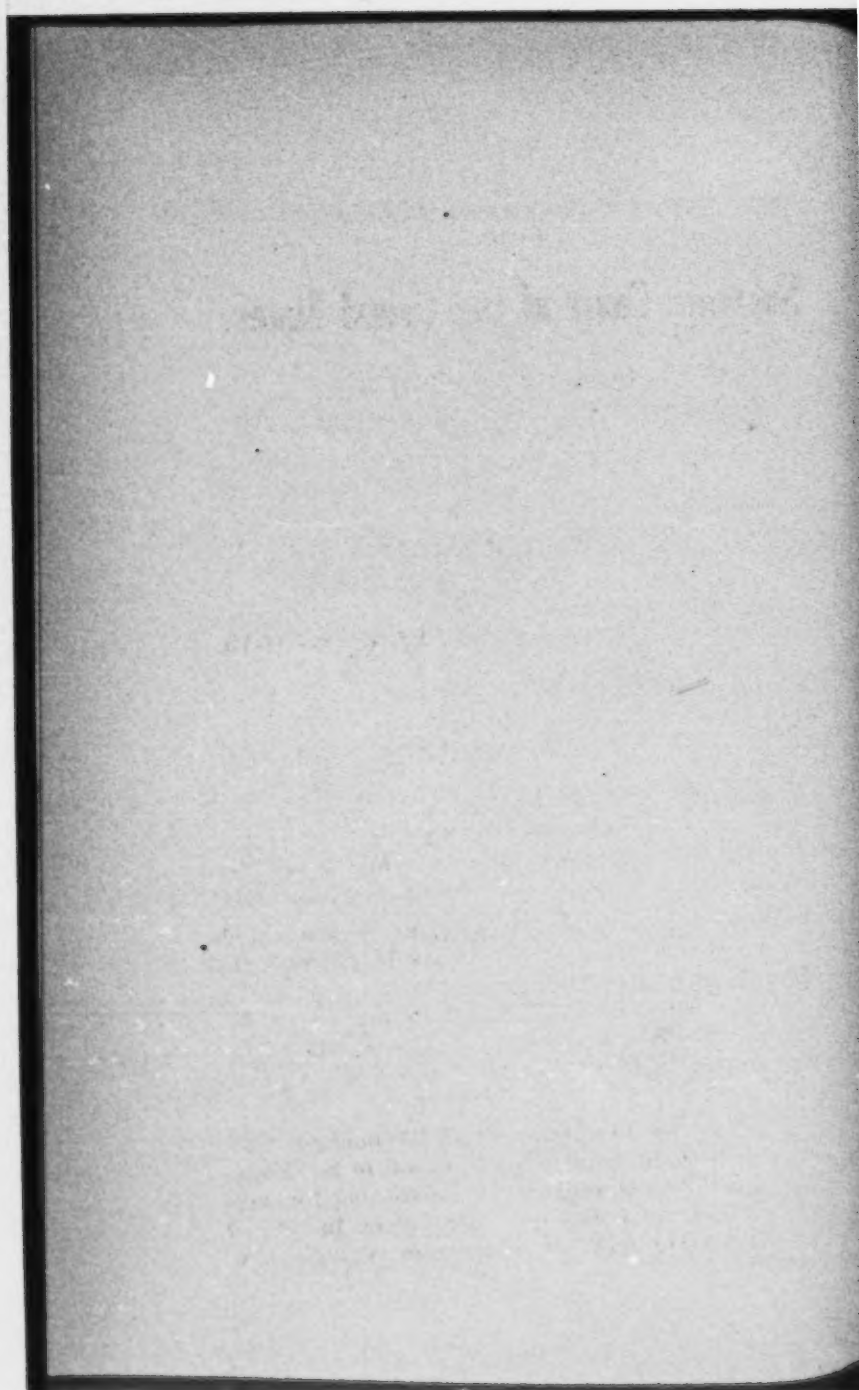
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MOTION TO ADVANCE CASE.

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WILLIAM M. HANDELY,  
*Deputy Attorney General.*  
*Attorney for Defendant in Error.*

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In the  
**Supreme Court of the United States**

October Term, 1915.

No. 275.

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A. B. CROWL, *Plaintiff in Error*,

*vs.*

THE COMMONWEALTH OF PENNSYLVANIA.

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MOTION TO ADVANCE.

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To the Honorable Edward Douglass White, Chief Justice, and the Associate Justices of the Said Court:

The Commonwealth of Pennsylvania, Defendant in Error, respectfully moves the Court to advance the hearing in the above stated case.

This case involves the violation of an Act of Assembly of the Commonwealth of Pennsylvania, approved March 24, 1909, (Pamphlet Laws 63), which is entitled:

“An act for the protection of the public health; and to prevent fraud and deception in the manufacture, sale, offering for sale, exposing for sale, and having in possession with intent to sell, of adulterated or deleterious ice cream; fixing a stan-

*Motion to Advance.*

STATE OF PENNSYLVANIA, }  
 County of Dauphin } ss:

Personally appeared before me, a Notary Public, duly authorized to administer oaths, James Foust, Dairy and Food Commissioner of the State of Pennsylvania, who being duly sworn says that the facts stated in the foregoing motion are true and correct to the best of his knowledge and belief.

Sworn to and subscribed this  
 .... day of September, 1915.

*Attest*

(Sgd.) *Edwin C. Denney*  
 Notary Public

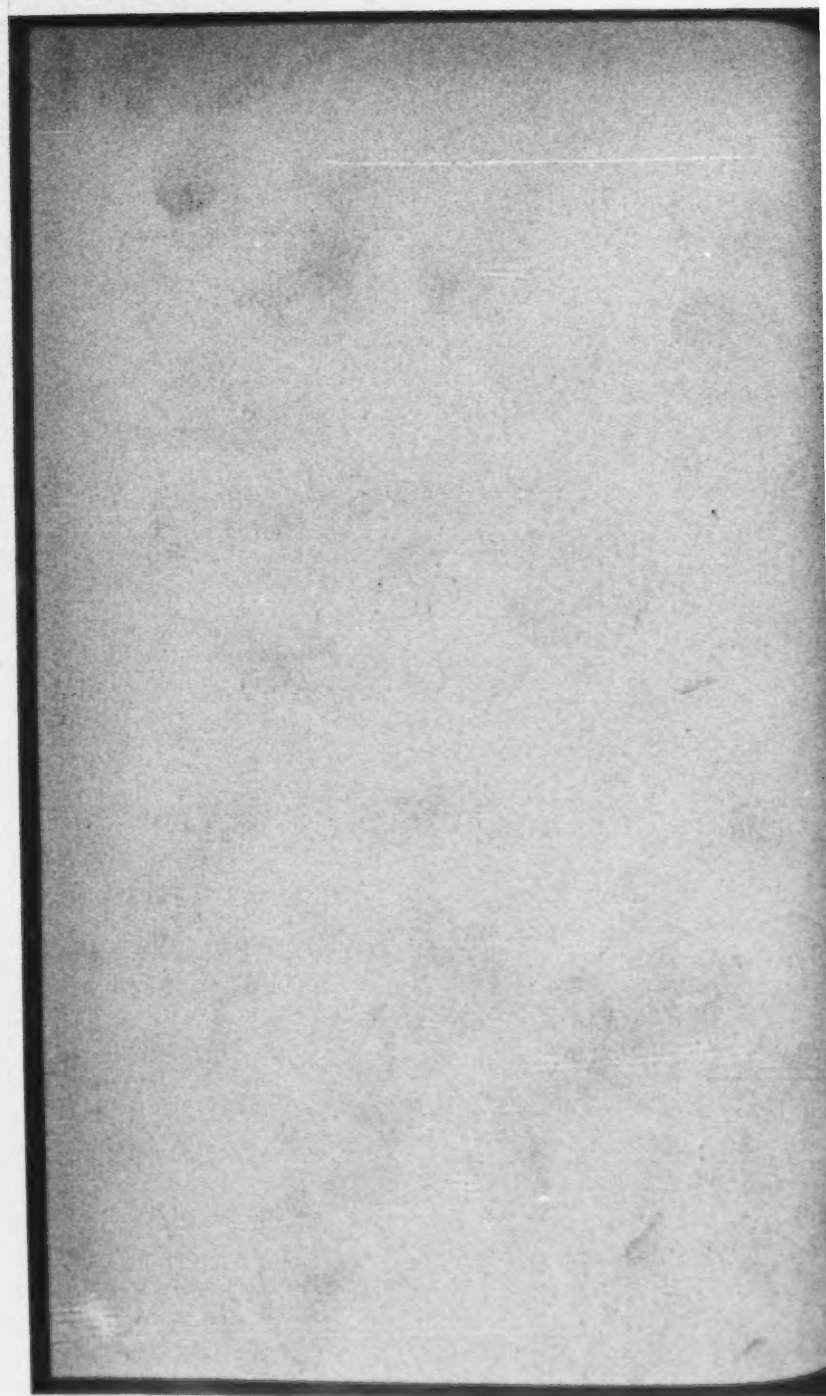
*Seal)*

*My Comm. Expires*  
*March 20th, 1917.*

..(Sgd.) *James Foust*







United States Court, D.

FILED

OCT 14 1915

JAMES D. MAHER

CLERK

**SUPREME COURT OF THE UNITED STATES.**

**OCTOBER TERM, 1915.**

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**No. 50**

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**A. B. CROWL, PLAINTIFF IN ERROR,**

**vs.**

**THE COMMONWEALTH OF PENNSYLVANIA,  
DEFENDANT IN ERROR.**

---

**AFFIDAVIT IN OPPOSITION TO MOTION TO ADVANCE  
CASE.**

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**WALTER JEFFREYS CARLIN,**  
*Attorney for Plaintiff in Error.*

**(24,424)**



IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1915.

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**No. 275.**

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A. B. CROWL, PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF PENNSYLVANIA.

---

**AFFIDAVIT IN OPPOSITION TO MOTION TO ADVANCE  
CASE.**

---

*To the Honorable Edward Douglass White, Chief Justice,  
and the Associate Justices of the said Court:*

A. B. Crowl, the plaintiff in error, respectfully opposes the motion made by the Commonwealth of Pennsylvania to advance the hearing in the above-entitled case for the following reasons:

That the question involved in the case is an important one, affecting the entire ice-cream industry, and the case is a test case, the defense of which is being conducted by the National Association of Ice-Cream Manufacturers, and it

will affect legislation in numerous States throughout the United States.

That investigations are being made by the National Association of Ice-Cream Manufacturers which have not yet been completed and which it wishes to submit to the court on the hearing of this case, and that said investigations could not be completed for at least a month from date.

That there is another case pending in the court, same being No. 235 on the October term, which involves the constitutionality of a standard for ice cream which fixes the standard of butter fat at 14 per cent and limits the ingredients to be used.

That all of the facts contained in both cases can be presented to the court at one time, and that it is the intention of the parties to ask that the two cases be heard at the same time, and your deponent respectfully requests that if the case be advanced at all, it be advanced to be heard in the usual order with said case No. 235.

It is respectfully submitted that no reason is given in the motion for the advancement of the case because the ice-cream season is now ended and will not again commence until May of the following year, whereas this case will be heard in its usual order in or about March, 1916.

For these reasons the plaintiff in error respectfully asks that the motion to advance the case be denied.

WALTER JEFFREYS CARLIN,  
*Attorney for Plaintiff in Error.*



STATE OF NEW YORK,  
*City of New York,*  
*County of New York, ss:*

Walter Jeffreys Carlin, being duly sworn, deposes and says that he is the attorney for the plaintiff in error in this case, and is also attorney for the plaintiff in error in case No. 235 of the October term of this court; that the facts stated in the foregoing affidavit are true to his own knowledge; that the reason that this affidavit is not made by the plaintiff in error is that the plaintiff in error is not in the same State that your deponent is, and that the motion papers were just served upon your deponent, and it would be impossible to send the papers to the plaintiff in error and have them printed so as to be presented on the 18th instant.

WALTER JEFFREYS CARLIN.

Sworn to before me this 13th day of October, 1915.

PAUL C. WERNER,  
*Commissioner of Deeds for the City of*  
*New York, Residing in New York County.*

County Clerk's No. 1125; Register's No. 17066.  
 Certificate filed in Kings County.  
 County Clerk's No. 211; Register's No. 7045.  
 Commission expires June 8, 1917.

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---

**BRIEF FOR PLAINTIFF IN ERROR.**

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This is a writ of error upon a judgment of the Supreme Court of Pennsylvania (Rec., 104) which affirmed a judgment of the Superior Court of Pennsylvania (R., 88), which court had affirmed a judgment of the Court of Quarter Sessions of Erie County, Pennsylvania (Rec., 86).

The plaintiff in error and one W. F. Lewis were indicted for selling "adulterated ice cream," and on motion the court quashed the indictment (Rec., 1, 4). Thereupon a new indictment was procured (Rec., 1), which charged no adulteration, but merely that A. B. Crowl and W. F. Lewis sold "chocolate ice cream, which then and there contained less than eight per centum butter fat, and not then and there being flavored with fruit or nuts, contrary to the form of the act of the General Assembly in such case made and pro-

vided, and against the peace and dignity of the Commonwealth of Pennsylvania" (Rec., 10).

Defendants below raised the question of the constitutionality of the act in question under the Constitution of the United States by demurrer, which was overruled (Rec., 8). Thereupon a trial before a jury was had and plaintiff in error was found guilty and his partner W. F. Lewis was acquitted. The constitutional question was also raised by requests to charge, which were refused (Rec., 12, 85), and by motion in arrest of judgment (Rec., 14), which was overruled (Rec., 19).

The main questions which were presented to the jury were two: First, Was the product that was sold by plaintiff in error ice cream? (Rec., 80, 84), and, second, Did the ice cream so sold contain less than 8 per cent of butter fat? (Rec., 80).

The court expressly charged the jury:

"That unless the jury find from the evidence that the product sold was chocolate ice cream the verdict of the jury must be not guilty" (Rec., 84);

so we must here consider that the jury did actually find that the product sold was ice cream.

The statute of Pennsylvania on which the prosecution is based is as follows (P. L., 63, Purden's Digest, vol. 5, p. 529):

"An act for the protection of the public health and to prevent fraud and deception in the manufacture, sale, offering for sale, exposing for sale, and having in possession with intent to sell, of adulterated or deleterious ice cream; fixing a standard of butter fat for ice cream; providing penalties for the violation thereof, and providing for the enforcement thereof.

"SECTION 1. *Be it enacted, &c.*, That no person, firm or corporate body, by himself, itself or themselves, or by his, her or their agents, servants, or employees, shall sell, offer for sale, expose for sale, or have in possession with intent to sell, ice cream adulterated within the meaning of this act.

"SECTION 2. Ice cream shall be deemed to be adulterated within the meaning of this act—

"*First.* If it shall contain boric acid, formaldehyde, saccharin, or any other added substance or compound that is deleterious to health.

"*Second.* If it shall contain salts of copper, iron oxide, ochres, or any coloring substance deleterious to health; *Provided,* That this paragraph shall not be construed to prohibit the use of harmless coloring matter in ice cream, when not used for fraudulent purposes.

"*Third.* If it shall contain any deleterious flavoring matter, or flavoring matter not true to name.

"*Fourth.* If it be an imitation of, or offered for sale under, the name of another article.

"SECTION 3. Nothing in this act shall be construed to prohibit the use of fresh eggs, and not exceeding one-half of one per centum of pure gelatin, gum tragacanth, or other vegetable gums.

"SECTION 4. No ice cream shall be sold within the State containing less than eight (8) per centum butter fat, except where fruit or nuts are used for the purpose of flavoring, when it shall not contain less than six (6) per centum butter fat.

"SECTION 5. It shall not be lawful for any person, firm or corporate body to sell, offer for sale, expose for sale, or have in possession with intent to sell, any ice cream in any container which is falsely labeled or branded as to the name of the manufacturer thereof; or to misrepresent, in any way, the place of manufacture of the ice cream or the manufacture thereof.

"SECTION 6. Any person, firm, or corporate body who shall violate any of the provisions of this act shall be guilty of a misdemeanor, and, upon conviction thereof, shall be sentenced to pay a fine of not less than twenty-five (25) dollars, nor more than fifty (50) dollars.

"SECTION 7. The Dairy and Food Commissioner shall be charged with the enforcement of the provisions of this act.

"SECTION 8. All fines and penalties imposed and recovered for the violation of any of the provisions of this act shall be paid to the Dairy and Food Commis-



sioner or his agent, and, when so collected and paid, shall thereafter be, by the Dairy and Food Commissioner, paid into the State Treasury for the use of the Commonwealth.

"Approved the 24th day of March, A. D. 1909."

The only question involved in this case is the question of the constitutionality of section 4 of the above act, which is as follows:

"SECTION 4. No ice cream shall be sold within the State containing less than eight (8) per centum butter fat, except where fruit or nuts are used for the purpose of flavoring, when it shall not contain less than six (6) per centum butter fat."

When the Supreme Court of Pennsylvania held the section in question to be constitutional (Rec., 104) plaintiff in error sued out his writ of error from the said ruling and decision of the Supreme Court of Pennsylvania to the Supreme Court of the United States, which was allowed by Mr. Justice Pitney (Rec., 104).

In October, 1915, on behalf of the Commonwealth of Pennsylvania, a motion to advance this case was made and opposed by plaintiff in error, who asked that the case be heard with the case of *The Hutchinson Ice Cream Company and C. J. Hutchinson, manager, vs. The State of Iowa* (No. 40, October term, 1916), and this court on November 8, 1915, entered an order directing the cases to be heard at the same time.

As these cases are heard together and involve questions somewhat similar, attention is directed to the briefs filed in the Iowa case.

#### Specifications of Error.

The Supreme Court of Pennsylvania erred in holding and deciding:

First. That the act of March 24, 1909, of the General

Assembly of the Commonwealth of Pennsylvania did not abridge the privileges and immunities of citizens or of the plaintiff in error (defendant below) nor deprive him of liberty or property without due process of law nor deny to him the equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Second. That the act of March 24, 1909, of the General Assembly of the Commonwealth of Pennsylvania did not abridge the privileges and immunities of citizens or of the plaintiff in error (defendant below) nor deprive him of his liberty or property in prohibiting the sale of ice cream under its own name unless the said ice cream contained the percentage of butter fat required by section 4 of the said act.

Third. That the act of March 24, 1909, of the General Assembly of the Commonwealth of Pennsylvania did not abridge the privileges and immunities of citizens or of the plaintiff in error (defendant below) nor deprive him of his liberty or property in prohibiting the sale of ice cream either under the name of ice cream or under any other name unless the said ice cream contain the percentage of butter fat required by section 4 of the said act.

Fourth. That the act of March 24, 1909, of the General Assembly of the Commonwealth of Pennsylvania, and particularly section 4 thereof, did not establish an arbitrary classification and did not deny the plaintiff in error (defendant below) the equal protection of the law as guaranteed by the Fourteenth Amendment to the Constitution of the United States, in prohibiting the sale of ice cream under any name unless the said ice cream contain the amount of butter fat specified in said section of said act and in dividing ice-cream into two classes, one of which contains fruit or nuts for the purpose of flavoring and the other which did not contain such fruit or nuts for flavoring, and requiring 8

per cent of butter fat where fruit or nuts were not used for flavoring purposes and 6 per cent where they were.

Fifth. That the act of March 24, 1909, of the General Assembly of the Commonwealth of Pennsylvania was not an arbitrary and unreasonable regulation and interference with a lawful business and did not abridge the privileges and immunities of the plaintiff in error (defendant below) nor deprive him of his liberty or property as guaranteed to him by the Fourteenth Amendment to the Constitution of the United States.

Sixth. That the legislature of the State had the right under the police power to prohibit the sale of a wholesome article of food which was not a substitute for or an imitation of another product and absolutely prohibited the sale of such article of food, to wit, ice cream, unless the product conform to and contain the specified percentage of butter fat that section 4 of the act of March 24, 1909, of the General Assembly of the Commonwealth of Pennsylvania required, and that the said act in so providing did not abridge the privileges and immunities of the plaintiff in error (defendant below) and deprive him of his liberty or property as guaranteed to him under the Fourteenth Amendment to the Constitution of the United States.

## BRIEF OF ARGUMENT.

### POINT I.

*"Ice cream" is a generic term embracing a large number and variety of products; the name of the product does not imply the use of dairy cream in its composition and the statute in question does not define the term.*

History and Meaning of the Term Ice Cream, appendix.

Muller *vs.* Oregon, 208 U. S., 412.

### POINT II.

*The act in question cannot be sustained under the police power, for it absolutely prohibits the sale of a wholesome article of food.*

Rigbers *vs.* City of Atlanta, 66 S. E., 991.

Hutchinson Ice Cream Co. *vs.* State of Iowa, No. 40, October Term, 1916.

State *vs.* Hanson, 136 N. W., 412.

People *vs.* Marx, 99 N. Y., 384.

Powell *vs.* Pennsylvania, 127 U. S., 678.

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McFarland *vs.* American Sugar Refining Co., 241 U. S., 79.

Truax *vs.* Raich, 239 U. S., 33.

People *ex rel.* Farrington *vs.* Mensching, 187 N. Y., 8.

Schollenberger *vs.* Pennsylvania, 171 U. S., 1.

## POINT III.

*The act does not tend to prevent fraud.*

- Heath & Milligan Co. *vs.* Worst, 207 U. S., 338.  
 Coppage *vs.* Kansas, 236 U. S., 1.  
 Murphy *vs.* California, 225 U. S., 623.  
 State *vs.* Layton, 61 S. W., 171.  
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 Atchison, T. & S. F. R. Co. *vs.* Vosburg, 238 U. S.,  
 56.  
 Price *vs.* Illinois, 238 U. S., 46.

## POINT I.

*"Ice cream" is a generic term embracing a large number and variety of products; the name of the product does not imply the use of dairy cream in its composition and the statute in question does not define the term.*

In the court below it was contended by the State that the term "ice cream" necessarily implied the presence in the product of some dairy cream and that the State was therefore justified in requiring 8 per cent of butter fat.

This view was followed in the opinion of the Superior



Court (Rec., 89), which was accepted by the Supreme Court (Rec., 104), for the court says:

"Its name implies the use of cream in its composition and all of the authorities to which the learned counsel for the appellant refers show that milk and cream are constituents in its composition."

We contend that "ice cream" is not and never was a term used to designate a product containing any stated amount or proportion of butter fat, and that the word "cream," which is part of the said term, does not and never did mean dairy cream (Appendix, p. 4).

That ice cream is made in various ways, with and without cream and without any reference to the percentage of butter fat therein, we submit is fully shown by the appendix to our brief on the "History and Meaning of the Term Ice Cream," compiled by Professor Child, of the University of Pennsylvania. In this brief he discusses in detail the history of the use of ice cream (Appendix, p. 5) and demonstrates conclusively that the term "cream" in the compound "ice cream" is used in the sense of a mixture and not in the sense of cream of milk (Appendix, p. 12).

Professor Child discusses the dictionary definitions of ice cream (Appendix, p. 26); the familiar use of the term (Appendix, p. 27) and its technical use, and he states as a conclusion (Appendix, p. 36):

"1. The origin, subsequent history, and present use of the term *ice cream* show that it has always covered a wide range of mixtures, the term *cream* meaning a mixture when it was used in the compound, and the range of mixtures being the same today, as regards use of cream of milk, milk, and eggs, as when the confection originated."

In defining the American use of ice cream Professor Child says:



### "3. 3. DEFINITION OF AMERICAN USE OF THE TERM 'ICE CREAM.'

"We reach now the following result: The history of the rise and use of the confection, the derivation of its name in English, French and Italian, the history of the use of the term from its origin to the present, the evidence afforded by standard dictionaries (except that they fail to note its universal use as a primary class-term in America), its use in current literature, the testimony of cook books, the understanding and application of it by professional cooks, by private housekeepers, by manufacturers, and finally the universal popular use and understanding of the term, all coincide in confirming the accuracy of the following definition:

#### "1. SPECIFIC USE.

"Ice cream is a confection, or prepared food served as a delicacy, consisting of one of various 'creams' or mixtures, as further defined below, frozen to a more or less rigid consistency in a suitable vessel or special contrivance, whether by packing in a freezing mixture (usually ice and common salt), or by air, brine, etc., chilled by modern appliances, or by other methods, with or without agitation or beating, during the process of freezing, by means of a dasher or similar contrivance, to ensure smoothness and the desired consistency.

"BASIS OF THE 'CREAM' OR MIXTURE.—The basis of the 'cream' or mixture may be a 'cream' (as now understood), or a 'custard' (in its recent sense, custards having been formerly also called 'creams'), whence come two typical kinds of the confection.

"(a) A cream as the basis of the first type, may have, as its basic ingredient either cream of milk only, preferably not too thick, in which case thinning with milk is advised to prevent over-richness, the product when thus containing a high percentage of butter fat being termed 'Philadelphia ice cream' (or, commonly in trade use, 'straight cream ice cream') or cream of milk and milk, or cream of milk, milk, and other ingredients—as condensed milk,

eggs, etc.—or milk and other ingredients, in proportions to produce a mixture of desired or available character as regards richness, healthfulness, or cost, varying from a high cream of milk content to plain milk. In the latter case, consistency is gained by adding whole eggs or egg yolks and often cornstarch, and bringing the mixture to a boil producing a custard, which, when frozen, because of its characteristic taste is often called 'frozen custard.' This, as a cream with a custard basis forms a connecting link with the second type, from which it is distinguished by lack of richness.

"(b) The second type of ice cream uses as its basis, a custard of a desired degree of richness, made of cream of milk, milk, and eggs, and brought to a boil, the product being specifically known in cook books as 'Neapolitan ice cream' or 'custard ice,' and in trade use as 'French ice-cream' or as 'frozen custard,' according to the method employed in freezing. It is characteristically employed for elaborate fancy ice creams, 'frozen puddings,' etc., and includes among its varieties some of the richest ice creams.

"USE OF EGGS.—Eggs enter as above into all custard mixtures. To cream mixtures, the whites of eggs may be added for cohesion and smoothness, and a modicum of yolk for color, as individual preference may direct. This use of eggs, in both domestic and trade use, extends even to 'Philadelphia ice cream,' popularly supposed to be without eggs.

"SWEETENING AND FLAVORING.—The mixture, further, is sweetened and flavored, the flavoring consisting of essences, such as vanilla, wines, or liqueurs, and fruit juice, fruit pulp, etc.

"ADDITIONAL INGREDIENTS.—There may further be added solid substances, as contributing to the flavor, or as diversifying the consistency, or as delicious in themselves, such as whole or ground nuts, candied fruit, powdered cake, or bread, etc. When the confection consists chiefly of such solid substances held together by ice cream, a special class of *ice cream* results known as 'frozen puddings.' There may further be added, as a 'stabilizer,' in place of the whites of eggs, a small amount of gelatin or vegetable

gum. In trade practice such addition is universal in ice creams of the first type described above.

"CHARACTERISTICS OF THE FINISHED PRODUCT.—

After freezing, as above described, the confection may be served in the mass, or specially moulded into 'bricks' or other shapes, or variously ornamented. In respect to its uses, ice cream is a sweet dish, made and enjoyed for its palatability, due to its flavor, consistency, and agreeable coldness, and for its attractive appearance to the eye, as the result of its frozen state, or as colored by its ingredients, or as specially colored, or as arranged in layers differently colored, or as shaped in special forms by moulds or otherwise, or as decorated with fruits, nuts, jelly, cake, or other edible or nonedible ornamentation, or as served in any way which taste or fancy may dictate."

In the Iowa case submitted herewith (No. 40, October term, 1916) the statute purported to define ice cream, but in this case there is no definition at all. The act does not require the use of any *cream*, and from the act itself (which does not discuss ingredients at all, except that it permits the use of harmless coloring matter, fresh eggs, gelatine, gum tragacanth, or other vegetable gums and prohibits the use of certain deleterious substances, as to which we have no question here), it appears that what a manufacturer is required to do is to have 8 per cent of butter fat in his product. Whether he puts the same in by using milk and condensed milk or other substances, makes no difference under the act. The result is, what is called ice cream, containing 8 per cent of butter fat, can be made without using any cream at all. This is easily proven.

In the first place, the arbitrary percentage does not show the customer what percentage of cream, milk, or condensed milk has been used in the manufacture of the product sold him.

It certainly does not show him what percentage of the other solids of milk, not fat, he is receiving, and it does not show the percentage of milk or cream or condensed milk in the product, as a few examples will show.

To make a batch of 100 pounds (which will make anywhere from 14 to 20 gallons finished, to which a reference will be made later), and remembering that all the butter fat in the product must come from the milk, cream, and condensed milk, we find that we must have 82 pounds of milk, cream, and condensed milk to get 8 pounds of fat. So we have

82 lbs. milk, etc. (8 lbs. milk fat).

16 lbs. sugar.

2 lbs. allowed for flavor, gelatine, and water for dissolving gelatine.

---

100 lbs. materials—8 lbs. fat.

Assuming that we always use the same amount of sugar, flavor, etc., we have 82 pounds of materials which must contain the 8 pounds of fat, and we can get the fat in many ways.

Milk and cream alone—more milk than cream:

36.2 lbs. 18% cream.

45.8 lbs. 3¼% milk.

16.0 lbs. sugar.

2.0 lbs. flavor, gelatine, and water.

---

100 lbs. 8% fat.

Milk, cream, and condensed milk—more milk and more condensed milk than cream:

24.4 lbs. 18% cream.

28.8 lbs. 9¼% condensed milk.

28.8 lbs. 3¼% milk.

16.0 lbs. sugar.

2.0 lbs. flavor, gelatine, and water.

---

100 lbs. 8% fat.

Milk, cream, and condensed milk—more milk than either condensed milk or cream:

25.7 lbs. 18% cream.  
 25.7 lbs.  $9\frac{1}{4}\%$  condensed milk.  
 30.6 lbs.  $3\frac{1}{4}\%$  milk.  
 16.0 lbs. sugar.  
 2.0 lbs. flavor, gelatine and water.

---

100 lbs. 8% fat.

Proportions of milk, cream, and condensed milk can be varied in a number of ways, still giving the required 8 pounds in the 82 pounds of milk liquid. Extreme variation would be to *discard cream and milk altogether* and use 82 pounds of  $9\frac{3}{4}\%$  per cent condensed milk or a fatter condensed milk and cut back with milk, skim milk or water.

So we see that under the statute a purchaser would not know what percentage of milk, cream or condensed milk was used in the manufacture of the ice cream offered to him, nor would he know whether skimmed milk or skimmed condensed milk had been used. Nothing in the statute forbids their use and the required percentage can be obtained, for example:

Condensed milk, cream, skimmed milk:

50 lbs.  $9\frac{1}{4}\%$  condensed milk ( $4\frac{5}{8}$  lbs. fat).  
 $18\frac{3}{4}$  lbs. 18% cream ( $3\frac{3}{8}$  lbs. fat).  
 $13\frac{1}{4}$  lbs. skimmed milk (no fat).  
 16 lbs. sugar.  
 2 lbs. flavor, gelatine and water.

---

100 lbs. 8% fat.



Condensed skim milk, cream, skimmed milk:

30 lbs. condensed skim milk (no fat).

43  $\frac{1}{3}$  lbs. 18% cream (8 lbs. fat).

8 $\frac{1}{4}$  lbs. skimmed milk (no fat).

16 lbs. sugar.

2 lbs. flavor, gelatine and water.

---

100 lbs. 8% fat.

Now, take any of the foregoing mixtures, all of which are "legal" and do not deceive or defraud anyone, and take out 8 pounds of the milk liquids and substitute 8 pounds of eggs and our butter fat point falls to 7.22 per cent. It is a better *and more expensive food*, but illegal—if the statute is valid. Now, being illegal, take out of it 10 pounds of the sugar, making it a poorer and cheaper food and less palatable and it is "legal" once more.

Or, take any of the foregoing "legal" mixtures, add 8 pounds of eggs and the butter fat point falls to 7.4. The purchaser is getting all he was to get originally and the eggs in addition—is he defrauded? Yet the mixture is now "illegal." Rob the mixture of 8 pounds of the sugar and the butter fat point rises again to 8 per cent.

Having shown that under this regulation the consumer is not informed as to the percentage of cream or of milk or of condensed milk present, let us go further and see if he is shown the amount of butter fat present in the measured quantity he purchases, for he does not purchase a weighed quantity.

As stated above, the batches of 100 pounds given as examples will make anywhere from 14 to 20 gallons of finished product, depending upon how much the volume of the mass is increased in the process of freezing.

The measure of the value of the product is made, not the amount of butter fat, but the percentage of butter fat, so that the measure is not the amount of butter fat that the



consumer would receive in a given portion of ice cream, but rather the percentage; for example, a purchaser might readily get more fat by weight in a seven per cent ice cream than he would in buying an eight per cent ice cream. That is, he might buy a pint of ice cream which only had seven per cent of butter fat and yet actually get more butter fat than he would if he purchased a pint of ice cream containing eight per cent of butter fat.

We see, therefore, that this is not an act to require ice cream to contain any cream or to be made solely of cream. Neither does the act use or refer to the word "cream" used either in the sense of cream of milk or in the sense of a mixture.

The statute in question does not even purport to define either the term or the product. We ask the court to follow the practice as established in the case of *Muller vs. Oregon*, 208 U. S., 412, and consider the facts presented in the appendix, which we submit establish our contentions as above set forth.

## POINT II.

*The act in question cannot be sustained under the police power, for it absolutely prohibits the sale of a wholesome article of food.*

The act does not attempt to standardize ice cream; in fact, it recognizes as ice cream all products heretofore sold under that name, but directs that in the future "no ice cream shall be sold unless it contains 8 per cent of butter fat." The court below has so interpreted the act, first, by quashing the indictment, which charged adulteration; it held that in this case there was no question of adulteration; and second, by charging the jury that they must find that the product sold actually was ice cream. The verdict that the plaintiff in error was guilty is therefore necessarily a finding

that the product sold was ice cream which contained less than 8 per cent butter fat.

The chemist for the State testified that the product in question contained  $2 \frac{7}{10}$  per cent of butter fat, and while the defendant's chemist testified to the contrary we are bound by the finding of the jury that it did in fact contain less than 8 per cent butter fat, and whether it contained 2 per cent, 5 per cent or 7 per cent makes but little difference, for in passing on the constitutionality of the act we must consider ice cream containing all amounts up to merely a fraction less than 8 per cent.

It is important here to note that the State does not contend that products containing less than 8 per cent of butter fat have now ceased to be ice cream. On the contrary, they contend that all products which formerly were ice cream still are ice cream, but that you cannot sell them under the name ice cream or under any other name. This is a distinction and an important distinction to be made with the Iowa case (No. 40, October term, 1916), for the Supreme Court of Iowa, inferentially, at least, holds such a statute as this to be unconstitutional, recognizing the force of the case of *Rigbers vs. City of Atlanta*, 66 S. E., 991 (Record, Hutchinson Ice Cream Co. vs. State of Iowa, No. 40, October term, 1916, p. 18). The Supreme Court of Iowa holds that in Iowa ice cream containing less than the specific percentage of butter fat and made of ingredients other than those set forth in the statute can be sold, *but not as ice cream* and that the products "formerly known as ice cream, but containing a lower per cent of fat than that prescribed by statute, is not prohibited." Under this Pennsylvania act ice cream *containing less than 8 per cent butter fat* cannot be sold at all under any name. The Pennsylvania act does *not* declare that ice cream shall not contain less than 8 per cent of butter fat. If it had so declared, then products containing less than 8 per cent of butter fat would have ceased to be entitled to the name "ice cream" if the statute

were valid, and we would have the same situation as in Iowa.

An indictment under such a statute would set forth that the defendant had sold a product as ice cream which was not in fact ice cream, in that it did not contain 8 per cent of butter fat. Here the defendant is charged with selling *ice cream*, not imitation ice cream or a product as and for ice cream, but ice cream itself, and the jury found that the defendant did sell ice cream, and all the testimony in the case was to the effect that this product which the State says contained  $2\frac{7}{10}$  per cent of butter fat was in fact ice cream within the common meaning of the term. The court in charging the jury said (Rec., 80):

"What is ice cream? Mr. Pelton says he bought it for ice cream. His testimony tends to show that it was ice cream and the testimony of the chemist who analyzed it also is to the effect that it was ice cream."

This statement of the court is borne out by the testimony of Mr. Pelton (Rec., 22). The testimony of Mr. Evans, chemist, offered for the State, also supports the statement of the court (Rec., 28-29).

We have the question squarely before us, Can the State under the police power arbitrarily say that ice cream containing less than 8 per cent butter fat cannot be sold at all?

This question, we submit, has been answered in the negative by the Supreme Court of Iowa (*Hutchinson Ice Cream Co. vs. Iowa*, No. 40, October term, 1916) and also by the Court of Appeals of Georgia in the case of *Rigbers vs. Atlanta*, 66 S. E., 991, where the court said in part:

"Ice cream, however, is a luxury rather than a necessity. Still, since it is a foodstuff, the regulation of the sale of it, so far as is necessary for the prevention of impurities, adulterations, and other similar things likely to affect the health of those using it, is also within the police power of the city; and if this ordinance, so far as the sale of cream is concerned, had that end in view, the court should not

declare it to be unreasonable or beyond the powers granted by the city charter. The complaint against the defendant's ice cream was not that it was impure or that it contained deleterious substances, or that it was likely to affect the public health, but that it was not rich enough in butter fats. The defendant, for the purpose of showing the invalidity of the ordinance as a health measure, offered to prove that the presence of this amount of butter fats was not essential to the ice-cream's being healthful—that the ice cream he was selling was just as good, from a sanitary standpoint, as the ice cream of the character prescribed by the ordinance would be. This evidence was admissible. The rule is that where an ordinance is not passed by express authority of the legislature, the courts may inquire into its reasonableness, and to that end may hear testimony.

"It is plain, from the ordinance itself, however, that 10 per cent or 12 per cent of butter fats is not essential to the wholesomeness of milk or of milk products, for, as to the milk itself, there is a prescribed percentage of 3.6 per cent of butter fats.

"Indeed, to state the matter with perfect fairness, the city does not really insist that the portion of the ordinance relating to the richness of ice cream was enacted for the protection of the public health, but rather insists that this part of the ordinance is valid as a measure for the protection of the members of the general public against being cheated by having ice cream of inferior value furnished them. It may be a serious question as to whether the provisions of the pure-food law of this State are not broad enough to take away from municipalities the right to prescribe standards of foodstuffs for the purpose of protecting the public from impositions not directly affecting the public health, but it will not be necessary to decide that point here.

"It will be noticed that under this ordinance the prohibition is not against selling ice cream of less than the prescribed percentage as ice cream, but against selling it at all. Though the seller distinctly informs the purchaser that the ice cream contains less butter fats than 10 per cent, the sale is unlawful, according to the ordinance. Even if the city has the

power to prescribe that no ice cream of less than a certain percentage of richness in butter fats shall be sold as standard ice cream, it still would not have the power to say that ice cream below that standard should not be sold at all.

"For instance, it might be permissible to say that the term 'ice cream,' or 'standard ice cream,' or 'first-class ice cream,' should relate only to ice cream of a certain prescribed richness, and that whoever sold ice cream of poorer quality should either by calling it under some other name, or by indicating on the vessel in which it is delivered, or otherwise, disclose the inferiority of its quality. But under the ordinance before us, if a physician desired that a patient should have ice cream, but did not deem it safe for him to take the richer ice cream, it would be illegal for anyone to furnish the grade of ice cream actually suited to the sick man's physical condition."

Under this statute a man could not sell an ice cream containing 7 per cent if he put a label on it (which would do away with the question of fraud or deceit), saying it contained only 7 per cent. His ice cream contains less than 8 per cent. It is ice cream, so he cannot call it anything else, as for example, "frozen dainties." He cannot sell it under any other name (if he did he could be convicted on proof that his product really was ice cream). He cannot sell it even if he verbally informs the purchaser that it does not contain 8 per cent of butter fat or puts a label upon it giving not only the fat percentage, but each ingredient.

What is the effect of this enactment? It does not define ice cream; does not allege that ice cream containing less than 8 per cent of butter fat is adulterated or is a substitute, but, on the other hand, it recognizes as ice cream products which do not contain 8 per cent, and yet it expressly prohibits their sale. Can the State prohibit the sale of a product which they do not claim is an adulterated product or a substitute for any other product and which is admittedly a wholesome and healthful product?



The situation presented is that a manufacturer cannot sell his product unless it contains 8 per cent of butter fat, even though it is a better, richer and more costly food than an 8 per cent ice cream (see Point I), and a consumer cannot buy such ice cream, no matter how much he may desire to so do.

Could the legislature say that candy could not be sold unless it contained a certain percentage of sugar? If it did, would the court listen long to an argument that sugar was the "food value" of the candy? Yet we have this same situation here. Ice cream is a confection—it is eaten, not for its food value, but because of its pleasing flavor—its appeal to the taste, because of its sweetness or coolness rather than upon either the fat or solid content.

Judge McHenry, in the District Court of Iowa, said:

"If the Legislature of Iowa can prescribe that ice cream shall contain 12 per cent of butter fat and prevent the sale of it without that ingredient they may equally provide that no baker shall sell cake unless it contains 20 per cent by actual weight of pure eggs to the pound of cake. They may also provide that no hotel keeper shall serve soup to his customers, without six per cent of animal fat therein, and both the manufacturer and the purchaser would be bound by this act of the legislative body."

No case can be found that will sustain the contention that under the police power a legislature may forbid the sale of a wholesome product under its own name. The cases are all to the contrary.

In *State vs. Hanson*, 136 N. W., 412, the Supreme Court of Minnesota considered an oleomargarine case. The act prohibited the sale of oleo "unless made and kept free from all coloration or ingredients causing it to look like butter of any shade or tint of yellow." The court said in part:

"The legislature says to them by this act: 'You cannot have what you want; you must either buy butter made from cream, or you must buy oleomar-



garine that is white.' Unless the prejudice of the people against the white color is removed, this is a command that they buy butter, and pay higher prices. It is impossible to appreciate why the public should not have a free choice, why butter should not be sold on its merits to those who want it, and why those who want oleomargarine of a yellow shade should not be permitted to have it."

And again:

"That this makes the law, in so far as it prohibits the manufacture or sale of oleomargarine made of a shade or tint of yellow, repugnant to both national and State constitutions, is a conclusion that follows inevitably. The decision in the Hammond Packing Co. case directly recognizes this, and practically holds that the law involved in that case would be unconstitutional, if construed as we have felt obliged to construe the law involved here. It is in fact conceded that the legislature had no right to prohibit the manufacture of oleomargarine. *It being a wholesome article of food, a statute prohibiting its manufacture or sale cannot be upheld. State vs. Hammond Packing Co., supra; State vs. Hanson, 84 Minn., 42; 86 N. W., 768; 54 L. R. A., 468.*" (Italics ours.)

The Marx case (*People vs. Marx*, 99 N. Y., 384) declared the New York oleomargarine act unconstitutional on the ground that it prohibited, not the manufacture of an "imitation" of dairy butter, but of an article to "take the place of butter" (see pages 383, 384). This case holds that the State cannot forbid the sale of a wholesome article of food under its own name.

The court, at page 387, points out the danger of such a doctrine, saying:

"Measures of this kind are dangerous even to their promoters. If the argument of the respondent in support of the absolute power of the legislature to prohibit one branch of industry for the purpose of protecting another with which it competes can be

sustained, why could not the oleomargarine manufacturers, should they obtain sufficient power to influence or control the legislative councils, prohibit the manufacture or sale of dairy products? Would arguments then be found wanting to demonstrate the invalidity under the Constitution of such an act? The principle is the same in both cases. The numbers engaged upon each side of the controversy cannot influence the question here. Equal rights to all are what are intended to be secured by the establishment of constitutional limits to legislative power, and impartial tribunals to enforce them."

Mr. Justice Cullen, of the New York Court of Appeals, in *People vs. Biesecker*, 169 N. Y., 53, discusses the principles laid down in the milk standard and oleomargarine cases, and says, at page 57:

"From these cases the following propositions may be deduced: 1. *That the legislature cannot forbid or wholly prevent the sale of a wholesome article of food.* \* \* \*

"Still, that distinction is narrow and I imagine that the sale and consumption of a well-known article of food or a product conclusively shown to be wholesome, could not be forbidden by the legislature even though it assumed to enact the law in the interest of public health. The limits of the police power must necessarily depend in many instances on the common knowledge of the times. *An enactment of a standard of purity of an article of food, failing to comply with which, the sale of the article is illegal, to be valid must be within reasonable limits and not of such a character as to practically prohibit the manufacture or sale of that which, as a matter of common knowledge, is good and wholesome.*" (Italics ours.)

In the court below the State challenged this statement and contended that the State could prohibit the sale of a food product, whether it was wholesome or not. On argument it was said that the legislature could prohibit the sale of white

bread—and permit the sale of rye bread or *vice versa*. For this position they cite the case of *Powell vs. Pennsylvania*, 127 U. S., 678.

This much-discussed case was upon a writ of error from the Supreme Court of Pennsylvania, which Supreme Court had held constitutional an act which was almost word for word with the act which was declared in the Marx case (*Poe. vs. Marx*, 99 N. Y., 384) to be unconstitutional. The modern opinion is that the Court of Appeals was correct in its decision, while the Powell case stands alone as the opinion of the Supreme Court of Pennsylvania. It is contended that the United States Supreme Court, by refusing to reverse the Supreme Court of Pennsylvania, has accepted the decision which, it is contended, holds that the sale of oleomargarine, even if it be a healthful product, may be absolutely forbidden under the police power.

In 1887, when the Powell case was heard by this court, it turned entirely upon a question of evidence. The court held that as the statute declared that the act was to promote the public health they could not, in the absence of conclusive testimony, go back of this declaration of the legislature. At page 684 of the opinion, the court discusses the offer, made by the defendant, in the court below, to show that the *particular oleomargarine sold by him* was pure and wholesome, and states in substance that the offer was not broad enough, for he did not offer to prove that *most kinds* of oleomargarine offered on the market did not contain ingredients which were injurious to health, and it was on this point, to wit, that there was no proof by Powell that oleomargarine generally was wholesome, that the court sustained the Pennsylvania court, holding in fact that the declaration in the act was conclusive. (See opinion by Gray, J., in *Schollenberger case*, 171 U. S., 26, where this is discussed.)

We see here that the Powell case is not therefore a decision that the legislature can prohibit the sale of a wholesome article of food, but merely a decision that in the absence of proof to the contrary the legislative declaration that a cer-

tain article of food is unwholesome if it is accepted by the court.

It must be noted that there is no question of wholesomeness in our case here. The court below quashed an indictment, which alleged that ice cream was adulterated. The legislature here does not say that ice cream containing less than 8 per cent butter fat is adulterated, but merely that it cannot be sold.

Ten years later, in the Schollenberger case (171 U. S., 1), the court held flatly that oleomargarine was a healthful product, citing with approval the Marx case, and taking into consideration all the facts of knowledge in reference thereto (p. 12), which facts they had refused to consider in the Powell case, owing to a limited offer of proof made by Powell.

As the law stands under the Schollenberger case the court takes judicial notice of the nature of products, and considers the real objects of statutes, not their declared purposes (*Lochner vs. N. Y.*, 198 U. S., 45). No such presumption as that indulged in the Powell case would be recognized, for as was said in *McFarland vs. American Sugar Ref. Co.*, 241 U. S., 79:

"As to the presumptions, of course the legislature may go a good way in raising one or in changing the burden of proof, but there are limits. It is 'essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate.' *Mobile, J. & K. C. R. Co. vs. Turnipseed*, 219 U. S., 35, 43; 55 L. Ed., 78, 80, 32 L. R. A. (N. S.), 226; 31 Sup. Ct. Rep., 136; Ann. Cas. 1912A, 463, 2 N. C. C. A., 243. The presumption created here has no relation in experience to general facts."

Having established, first, that this statute itself absolutely prohibits the sale of a wholesome article of food, and second, that the prohibition of the sale of a wholesome article of food

cannot be supported under the police power, we wish now to direct the attention of the court to the fact that this so-called 8 per cent standard is a purely arbitrary one. A reasonable basis must be found if it is allowed to stand. What possible basis is there for this 8 per cent standard? Why 8 per cent butter fat any more than 7 per cent, and why not 9 per cent instead of 8 per cent? The answer is that there is no basis whatsoever, but it is purely arbitrary and it is also unreasonable, for we find that many kinds of ice cream do not contain 8 per cent of butter fat, and the legislature recognizes this by recognizing these kinds as ice cream. If the legislature can say that no ice cream containing less than 8 per cent of butter fat can be sold, and if they can fix 8 per cent at one session, they can change it to 2 per cent at the next session, or 16 or 30 per cent at the following session, and any of these percentages would have just as much and no more basis than the present arbitrary 8 per cent.

This is pointed out in the opinion of Mr. Justice Hughes in the case of *Truax vs. Raich*, 229 U. S., 33, where he says:

"If the restriction to 20 per cent now imposed is maintainable, the State undoubtedly has the power, if it sees fit, to make the percentage less. We have nothing before us to justify the limitation to 20 per cent save the judgment expressed in the enactment, and if that is sufficient, it is difficult to see why the apprehension and conviction thus evidenced would not be sufficient were the restriction extended so as to permit only 10 per cent of the employees to be aliens, or even a less percentage; or were it made applicable to all businesses in which more than three workers were employed instead of applying to those employing more than five. We have frequently said that the legislature may recognize degrees of evil and adapt its legislation accordingly (*Consolidated Coal Co. vs. Illinois*, 185 U. S., 203, 207; 46 L. Ed., 872, 875; 22 Sup. Ct. Rep., 616; *McLean vs. Arkansas*, 211 U. S., 539, 551; 53 L. Ed., 315, 321; 29 Sup. Ct. Rep., 206; *Miller vs. Wilson*, 236 U. S., 373, 384; 59 L. Ed., 627, 632; 35 Sup. Ct. Rep.,



342); but underlying the classification is the authority to deal with that at which the legislation is aimed."

Not only is there no reasonable basis for this 8 per cent butter fat regulation, but it provides an arbitrary classification by making allowance for fruit and nuts, while it makes no allowances for eggs and other ingredients, though the statute itself permits the use of eggs. That such a classification is unlawful, see cases of *People ex rel. Farrington vs. Mensching*, 187 N. Y., 8, where it is said:

"The classification must be such as in the nature of things suggests and furnishes a reason and justifies the making of the class. The reason must inhere in the subject-matter, and must be natural and not artificial. Neither mere isolation nor arbitrary selection is proper classification. (*G., C. & S. F. Ry. Co. vs. Ellis*, 165 U. S., 150; *Cotting vs. K. C. S. Co.*, 183 U. S., 79; *Connolly vs. U. S. P. Co.*, 184 U. S., 540; *Matter of Pell*, 171 N. Y., 48; *People vs. O. C. R. C. Co.*, 175 N. Y., 84; *Ruhstrat vs. People*, 185 Ill., 183; *People ex rel. McPike, vs. Van DeCarr*, 91 App. Div., 20; 178 N. Y., 425; *Wright vs. Hart*, 182 N. Y., 330; *People vs. Beattie*, 96 App. Div., 383; *People ex rel. Appel vs. Zimmerman*, 102 App. Div., 103.)"

Further, it discriminates between dealers who manufacture ice cream without using fruit or nuts for flavoring and those who do use nuts for flavoring, thereby denying the former the equal protection of the law. All recent U. S. Supreme Court decisions on this point are reviewed in—  
*State vs. Miksicek*, 125 S. W., 501.

The question whether a particular regulation is a valid exercise of the police power is ultimately a judicial, not a legislative question.

*Dobbins vs. Los Angeles*, 195 U. S., 223.  
*Lochner vs. New York*, 198 U. S., 45.



Atchison, T. & S. F. R. Co. *vs.* Vosburg, 238 U. S., 56.

Coppage *vs.* Kansas, 236 U. S., 1.

Price *vs.* Illinois, 238 U. S., 46.

We submit that we have shown that the act absolutely prohibits the sale of a wholesome article of food, to wit, ice cream either under its own name or any other name; that the 8 per cent requirement is without basis, being purely arbitrary; that the allowance of 2 points for the use of fruit or nuts is arbitrary and discriminatory, and that therefore the act is not a proper exercise of the police power.

### POINT III.

#### *The Act Does Not Tend to Prevent Fraud.*

The court below upheld the act as being within the police power as tending to prevent possible fraud.

The court says (Record, p. 88):

"We are only concerned, therefore, with the inquiry whether a statute which fixes a standard of quality for ice cream is within the police power. The purpose of the act was to suppress false pretenses and to secure honest dealing in the sale of an article of food. That ice cream is in general use is admitted; that it is largely composed of milk and cream is shown by the evidence in the case. Its name implies the use of cream in its composition and all of the authorities to which the learned counsel for the appellant refers show that milk and cream are constituents in its composition. It enters so largely into the food supply of the public as to have become a proper subject of legislation especially in view of the opportunities which its manufacture affords to practice imposition. In the popular understanding it is largely composed of milk, of which butter fat is an important constituent. If by the exercise of

ingenuity and by the practice of unwarranted thrift a product can be put on the market having the name and appearance of ice-cream but lacking the chief element which gives its value as an article of food a large opportunity would be afforded to dealers in that article to profit by deception and it is the opportunity for such deceit of which the police power takes notice and seeks to take away. It is not necessary that injury has been done or a wrong perpetrated. The possibility that such results may take place warrants legislative intervention under the police power."

We have already shown that the statement of the court that the "name implies use of cream in its composition" is erroneous (Point I) and this is the whole basis of the court's decision. The court says in effect, people expect to get ice cream made of some cream and milk; therefore we uphold the 8 per cent requirement as requiring some "cream." Both statements are erroneous, and if they were not they would afford no basis for this arbitrary 8 per cent regulation; for we have shown that 8 per cent ice cream can be made with condensed milk and skimmed milk (Point I). What possibility of fraud is there? The sale of ice cream of one quality for ice cream of another quality? In the absence of misrepresentation (which a standard cannot prevent) there is no possible fraud.

We submit that there is no deception in selling an ice cream containing no more than 6, 4, 2, or even no percentage whatever of butter fat. As long as it is ice cream, and it may be in any of these instances, and if it pleases the customer, who has not specified or even *intimated* that he wanted any particular percentage or any particular amount of butter fat, he gets what he ordered and is not deceived or defrauded. The only case in which he would be deceived or defrauded is where he specified that the ice cream should be made only of cream or should contain a certain percentage of butter fat and the product sold him was not in accordance with the representations made. Here we have no

such case. The only representation was that the product sold was ice cream, and there can be no doubt that the product sold was ice cream within the common acceptance of the term.

If the court were to say that a man who purchases a 6 per cent ice cream is deceived or defrauded, what about the man who purchases an 8 per cent ice cream? Is he defrauded or deceived because, whether he knows it or not, he could have purchased next door ice cream containing 14 or 16 per cent? Or suppose he purchased a 16 per cent ice cream; if next day he purchases from another dealer a 9 per cent ice cream, is he deceived or defrauded in the second instance. In all cases he gets ice cream, which is what he asked for, and he certainly is not deceived. A customer will regulate his purchases by his taste and pocket book, and the manufacturer has the right to fulfill the demand and to sell a wholesome product, under its proper name, which the public taste demands.

If we accept the testimony in the case that the ice cream in question contained but  $2\frac{7}{10}$  per cent of butter fat, was the man who bought it defrauded? It was rich in milk solids and flavored with good chocolate, was palatable and cold, and it was *ice cream*—just what the customer asked for. Can we say that because the statute required 8 per cent the customer was defrauded? That is what the State says; but that is assuming the very point in controversy—assuming the validity of the statute. Without the statute there is no possibility of fraud in the absence of actual misrepresentation. The statute creates the possibility of fraud; for before its enactment the purchaser never thought or heard of a butter fat standard; had no right to assume that the product he was purchasing had any special percentage or any percentage of butter fat. Customers had the right to assume that no other than customary ingredients were used in the product. They still have just the same right, for the statute has not attempted to limit ingredients. They had no right to assume or believe that they were purchas-

ing any particular kind or quality of ice cream any more than they would be justified in assuming that the cloth in a suit of clothes was all wool.

Nor would the State be justified in forbidding the sale of clothing unless it contained a certain percentage of wool—on the theory of the possibility of some one believing that all cloth contained some wool, and not only some wool, but at least the arbitrary percentage of wool that the legislature selected.

The limit to which this court has gone is to require labeling of different grades of the same commodity. In *Heath and Milligan Co. vs. Worst*, 207 U. S., 338, this court held a labeling statute relating to paints to be valid. That it would not have held a statute valid which prohibited the sale of all other *paints as paint* unless they conformed to the statutory definition we believe is forecasted by the opinion of Mr. Justice McKenna in that case. In other words, while labeling may be required, sale cannot absolutely be prohibited (*Coppage vs. Kansas*, 236 U. S., 11; *Murphy vs. California*, 225 U. S., 623).

The oleomargarine cases cited below relate and refer to the possibility of the sale of one product as and for another—the possibility of the sale of oleo as butter. They had no relation to the sale of one grade of oleo for another grade of oleo, or one grade of butter for another grade of butter.

Here the question is not of the sale of a substitute for a product, but of the product itself, and the oleomargarine cases are not in point.

*State vs. Layton*, 61 So. W. Rep., 171.

*Peo. vs. Biesecher*, 169 N. Y., 53.

*State vs. Hanson*, 136 N. W., 412.

The court below relies on the milk-standard cases. The milk-standard cases are not in point, for we find that milk has been standardized, because it is a natural product, the

adulteration of which is such a simple matter. Milk has always been composed of the same constituents, though in different breeds and different animals of the same breed the porportion of these constituents may vary to some extent. Notwithstanding the known fact of this variation in the milk of different cows, not a variation in the kind and number of constituents, but in their relative proportions, it was deemed necessary, milk being among the necessities of life, to standardize milk, practically as a health measure, but chiefly to prevent fraud in a common necessity of life; in other words, to prevent the adulteration of a natural product by the addition of water. This distinction is clearly pointed out in *Rigbers vs. City of Atlanta*, 66 So. Eastern, 991, where the court contrasts milk with ice cream. Ice cream is not a natural product; it is a manufactured product; an artificial compound without well-defined limits as to the variety or number of ingredients and without fixed proportions for such ingredients as may be used. On the other hand, milk, as has been pointed out, always has the same kind and number of constituents, the proportions of which, not of one but of all, have been fixed for legal milk and standards based on the fair average of thousands of tests have been enacted.

Ice cream is not a milk product. In many ice creams of excellent quality (some of them lawful under this act and some unlawful) the sugar alone exceeds the total milk solids, and where eggs are used the weight of the eggs also often exceeds the weight of the total milk solids, and other ingredients valuable as food may also be added. The act itself recognized that ice cream is not a milk product and places no limit on the number or variety of ingredients, but only requires—and this without reason—that, regardless of the number and amount and food value of the ingredients, a specified percentage of butter fat shall be maintained. The act does not even require that there shall be any milk or cream in ice cream, but only that there shall be present the



specified percentage of butter fat. Counsel for the State argued to the court below that in effect the act requires a certain proportion of milk and cream "because no ice cream is made or can be made without cream or milk," and the court below accepted this view. Both counsel for the Commonwealth and the court failed to find any mention of milk or cream in the act. Counsel for the Commonwealth sought to show and the court below held that within the common knowledge ice cream is composed chiefly of milk and cream. We respectfully submit that it may not be held that only so much of the common knowledge, custom and usage as can be made to seem to support this act has force and weight, and, further, we submit respectfully that, because this act disregards lawful custom and usage and the common knowledge of the times, it must be held void and of no effect.

Milk is not a manufactured product and was not standardized on a basis that would permit it to be made of any ingredients so long as it contained a final specified percentage of butter fat. Could a man take butter and water and *make* a product and sell it as milk? Could he do it even if the product he made was better than natural milk? This so-called standardization forbids the sale of superior ice creams because a constituent element of one or more of its possible ingredients is not present in a certain percentage in the finished product. In a natural product such as milk it is always first provided, by a standard, that nothing shall be added to or taken away from the natural product, so that when a consumer buys milk that is standardized he knows, *first*, both the amount and percentage of butter fat he is receiving; *second*, the amount, percentage and nature or kind of the total of the other solids and what the said solids are, and, *third*, the amount of water naturally present in the milk. In this attempt to standardize ice cream, a manufactured product, the 8 per cent shows him none of these things, for he does not know the amount of butter fat he



is to receive, the amount or percentage of cream or milk or condensed milk or skimmed milk used in the manufacture, or whether or not any cream or milk were used at all; he does not know the amount or percentage of sugar, flavor or other ingredients used, and in fact he knows nothing at all about the product and is really deceived into believing that the percentage of butter fat is of importance, while as a matter of fact it is not, as has been conclusively shown.

The court below relies on *State vs. Campbell*, 64 N. H., 404; *Commonwealth vs. Waite*, 11 Allen, 264; *State vs. Smyth*, 14 R. I., 100.

The Waite case was a case where water was added to the natural product milk—a clear case of adulteration. The Campbell and Smyth cases construe statutes which declare milk not conforming to the standard to be adulterated, and the court therefore assumed that normal milk conformed to that standard and refused to hear evidence to the effect that the milk in question had not been adulterated.

Regardless of all other considerations, it is conclusive on the question here involved that the ice cream is not declared by the statute to be adulterated, while milk standards were upheld on the ground that the legislature had declared all other milk to be adulterated. Milk-standard acts, which have been sustained, all declare that all milk not conforming to the standard is adulterated, and the courts have held that evidence showing that milk which did not conform to the standard was not in fact adulterated would not be received. Here we have no standard. Ice cream not conforming to the regulation is not declared to be adulterated and there is no question of adulteration in the case, so the milk-standard cases are clearly not in point.

As no possibility of fraud existed before the enactment of the statute, there was no fraud to prevent, and therefore no case for the application of the police power.

No attempt, as far as we have been able to ascertain, has heretofore been made to prohibit the sale by legislative ac-

tion of all grades or types of a manufactured article except that particular grade or type selected by the legislature. If this enactment is to be sustained it must be on the broad ground that the legislature can forbid the sale of wholesome articles of food or of any grade or kind of manufactured articles—that it can arbitrarily say that only one kind of candy can be sold and that must contain 80 per cent of sugar—that sponge cake must contain a certain percentage of eggs—that gray paint cannot be sold unless it contains a certain percentage of lamp black—that shirts or collars cannot be sold unless they contain a certain percentage of linen—that thread must be made of silk—or any other of a thousand regulations which would be arbitrary and useless and tend merely to favor one grade of article at the expense of another and of the public generally. To sustain this decree would be to extend the limit of the police power to such an extent as to make our legislatures the battle ground where every manufacturer would seek to have his grade of goods made standard and the sale of all others forbidden.

Clearly this should not be done unless necessary to prevent fraud—and we submit that we have shown that no such necessity exists—that no possibility of fraud existed before the enactment of this statute—and of course will not exist when the statute is declared unconstitutional.

#### LASTLY.

*We submit that the decree of the Supreme Court of Pennsylvania must be reversed.*

WALTER JEFFREYS CARLIN,  
*Counsel.*

BRIEF

ON THE

History and the Present Meaning

OF THE

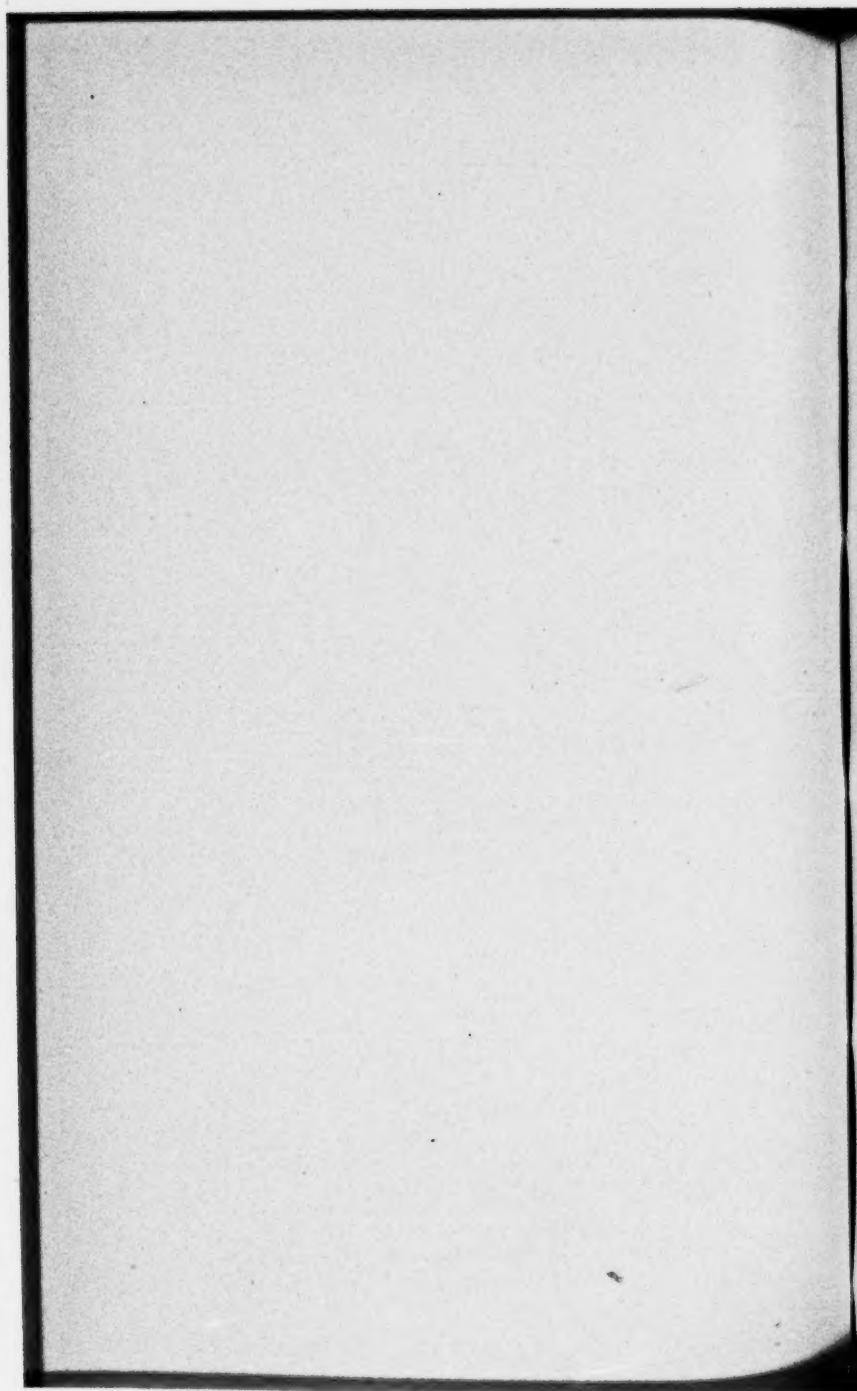
Term ICE CREAM

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COMPILED BY

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## BRIEF ON THE HISTORY AND PRESENT MEANING OF THE TERM "ICE CREAM."

### 1. PURPOSE.

1. 1. The purpose of this brief is:

- (a) to trace the history of the term *ice cream*;
- (b) to determine its former and present meaning;
- (c) to frame a definition of its present use.

1. 2. Such an inquiry is necessary, for incorrect decisions are made as to the meaning even of words so simple and even by persons in authority, owing to ignorance of the facts of language, incomplete knowledge of facts in the individual case, neglect of those facts though known, or prejudice, due to some *ex parte* consideration.

1. 3. Typical errors are as follows:

1. 31. A modern use of a term is recognized and an older ruled out.

As if it were ruled that the word *currants* must be held only to mean the common garden fruit, and the original sense of "raisins" excluded.

1. 32. An older sense is recognized and a modern sense excluded.

As if *corn* were ruled to mean "grain in general" only, and not specifically maize in American use, wheat in South Britain, oats in North Britain and Ireland.

Or as if *barn* were held inadmissible in the sense "car barn," and admissible only in the sense of a structure for sheltering farm animals and storing farm products—a method of decision that, pushed to its logical extreme, would confine *barn* to a place for storing barley.

1. 33. The meaning of a word is in question, not because it is applied to different things or the same thing in markedly different uses, as in the previous cases, but because, as a class-term it includes a variety of different kinds of the thing it denotes, and it is necessary to determine the limits of that inclusion. In default of, or in despite of, historic and other evidence, judgment is rendered by arbitrarily referring to what is assumed to be the "apparent" or "obvious" or "accepted" or "original" or "physical" sense of the term, in place of determining the word's real meaning and use.

As if a question arose whether a new explosive, differing only in the use of another salt than saltpetre, had a right to be called *gunpowder*. The referee notes that it can only be manufactured in quarter-inch cubes, and affirms that as the word *gunpowder* calls for a powder, the new explosive cannot be called by that name—

thereby leaving out of account the whole history of gunpowder and the facts as to its present manufacture.

Or as if a referee should rule that plum-pudding must be made of plums, or that soda-water must be made of soda, or that biscuit must be twice-cooked, and the like.

1. 34. In a case similar to the last, judgment is rendered for *ex parte* reasons, which, whether well-intentioned or not, have nothing to do with the matter.

As if it should be ruled that the term *gunpowder* should apply only to gunpowder sold in particular tins of a kind favored by foreign buyers, or that the term *cake* should not apply to certain forms of cake as being too simple, or to other forms as being too rich.

1. 35. The examples given of erroneous decisions are purposely made obvious. But the danger of using such erroneous methods of decision in cases not so obvious is ever present, even among well-informed persons.

In the particular case in hand, the definition of *ice cream*, there is danger of committing the errors described under 1. 34, 1. 35.

These errors have been committed.

It has been asserted (cf. 1. 34) that *cream* in the compound *ice cream* means the oily part of milk, which it does not mean, did not mean when the compound was adopted in English, and has never meant since.

Further (cf. 1. 35), it has been asserted that use of the term should be limited to the confection as made with cream (in that sense) alone—ostensibly for the interests of the public, but in violation of the true meaning, and, it may be added, plainly to the prejudice of the public interest, if due consideration is given the pertinent facts.

1. 4. The only method possible of determining accurately the definition of a word is to review the history of its use from its origin to the present, and to take into account all the necessary facts relating to the thing it denotes in the past and at the present.

This is essential, whatever the difficulty, or however incomplete or confused the historic record. In the present case, the task is not difficult and the record is not incomplete or confused.

1. 41. Sources of information are:

(a) Standard dictionaries and encyclopedias, the definitions and statements in which represent interpretations of the historic record by experts.

(b) The historic record itself with a view of submitting a wider range of evidence, substantiating or correcting the findings of standard authorities, and carrying the final definition to fuller detail than is possible in the limited space available in works of reference.

(c) Evidence as to the present usage of the word and present practice as regards the thing it denotes derived from actual life.

1. 5. The inquiry falls into the following divisions:

(a) The history of the confection called *ice* or *ice cream* (2).

(b) The history of the term (3).

(c) Present meaning and inclusion, summarized in a definition (4).

## 2. HISTORY OF THE USE OF ICE CREAM.

2. 1. The use of snow and ice for preserving and chilling food and drink goes back to an indefinite antiquity. Iced beverages—wines or various fruit mixtures—have probably been used in Southern Europe without intermission from classical times to the present. The Oriental sherbet was known in the 16th century. The class of sweets known as “creams” were served chilled before the practice of freezing came in.

2. 2. The art of making solid or semi-solid sweets by freezing could not develop systematically before freezing mixtures of ice and saltpetre or common salt came into use for this purpose. Such freezing mixtures were early known—Bacon, for example, refers to them familiarly in his *Sylva Sylvarum* 1627—but this application of them was not, so far as the record shows, known to France before 1660 or England before the 18th century.

2. 3. *Italy*.—The art of making frozen confections originated in Italy. The date is uncertain. Earlier than elsewhere in Europe, cookery was there taken seriously, and processes and recipes were jealously guarded, so that the publication of cookery books does not appear until a late period. It is sometimes asserted, without authority, that the cooks of Catherine di Medici brought the use of ices with them to France in the 16th century, but the first certain knowledge of Italian ices comes with their introduction into France after the middle of the 17th century.

When information concerning Italian ices becomes available, the same wide range of mixtures appears, including water-mixtures and cream-mixtures, as appears earlier in the French and English record. As in France and England, these mixtures are used unfrozen and frozen. Typical of Italy is the extensive use of partly frozen beverages, especially lemonades, served in glasses at social gatherings like our mousse, or obtainable at the *caffè*. Lemonades so frozen are, in some parts, notably Sicily, often taken in place of morning coffee, during the summer.

The influence of Italy in devising new recipes, and new decorative features, has continued to the present day. This appears in the repute of Italian ices throughout Europe, the vogue of Italian confectioners in foreign countries, and continuous references in titles of and recipes in books on the making of sweets and desserts.

2. 4. *France*.—France learned from Italy to consider cooking as a fine art. Montaigne (*Essai LI*) records his amusement at hearing a clerk of the kitchen” discourse gravely on the subtleties of his profession.

The introduction of ices into France, or their general use, dates from the establishment of the Café Procope, about the year 1660, by an Italian from Palermo (sometimes said, on less authority, to have come from Florence), named Procopio Cultelli or Coltelli. This café became noted for its ices. Incidentally, the son of the founder, M. Coltelli, known as Procope Conteau, 1684-1753, won

distinction as a physician and dramatic author. Much later Tortoni's (also established by an Italian) became famous in like fashion.

The historic record in France is both earlier and more abundant than in Italy. It shows clearly that the new fashion from Italy was less an impartation of new recipes than of a new process—what was learned was the application of this new process to beverages and desserts already long established in French use. (See 3.)

2. 5. *England*.—The influence of France upon England in respect to fashions in clothes and cookery is not a modern thing—though in the 18th century, and still more in the 17th, Paris was not the absolute arbiter that she became during the 19th. Italian influence upon clothes and manners became a scandal in the latter part of the 16th century, but this, with any other inclination to ape foreign customs, disappeared in the 17th century under Puritan influence. With the Restoration, French fashions were brought back by the English Royalists returned from France. A wave of moral reform followed, supported by the throne under William and Mary, but this did not lead to any effective hostility towards foreign fashions in such matters as clothes and cookery. French influence upon cookery is abundantly manifest in the number of cook-books from French originals during the 18th century.

How early the use of ices came into England cannot be determined with precision. Large private establishments might have had French cooks or have used French methods or recipes, without their becoming generally known—and a special practice might for some time become general before evidence of it would appear in letters, diaries, plays, fiction, or in cook-books. The earliest reference to ices yet found occurs in a letter of Lady Mary Wortley Montague written on October 1, 1716, to "Lady X——." "The company are entertained with ice in several forms, winter and summer." She writes from Vienna to a friend in England, who, it will be seen, is assumed to know what "ice" is. The use of ices in England may safely be assumed, to a limited extent, if not generally, in the first half of the 18th century. This assumption is confirmed by the date 1769, of the earliest use found of *ice cream*, in Mrs. Raffald's *English Housekeeper* (see Appendix 2B) where the manner in which the process of freezing is described proves that it was not a novel and unfamiliar thing.

While the use of creams as sweets has been common in England from the 15th century to the present day, the use of frozen creams, and ices in general, except as eaten at the confectioner's or ordered for special occasions, has been restricted by the scarcity of ice and the disposition to regard it as a luxury, rather than, as in the United States, as a necessity.

### 3. THE HISTORY OF THE TERM.

3. 1. The term *ice-cream* is a compound. It is necessary to determine

(a) The meaning and use of the element *ice* (3. 12).

(b) The meaning and use of the element *cream* (3. 13).

(c) The manner of, and reason for, the formation of the compound (3. 14).

(d) The relation of the terms *ice*, *ice cream*, in their subsequent English use as general terms, together with the adoption of subsequent secondary terms to define special classes or kinds included under these general terms (3. 15).

(e) The present meaning of *ice cream* in American use as determined by all available evidence (3. 2).

In all cases except the last, the foreign terms must be considered from which the English terms were derived.

### 3. 12. ICE.

3. 121. *Ice*.—The generic term for frozen confections in Italian has been from the earliest records, *gelato*, literally "iced (thing)." It is used of the confection considered in the mass, as in the question "*Che gelato avete?*" "What ice (i. e., ices) have you?", or in speaking of varieties, *gelato di arancio*, orange ice, *gelato di crema*, vanilla ice, etc., with the plural, *gelati*, ices (of several sorts). Also, because of the mode of its formation, it could, without awkwardness, be used with the article or a numeral in the sense of a portion of ice, as *un gelato doppio*, a large sized ice, *cinque gelati*, five portions of ice.

3. 122. In German, a term similar in formation and use, *Gefrorenes*, appears. It was presumably modeled directly upon the Italian, while the alternative term *Eis* either developed naturally, or was adopted, by translation, from the French *glace*.

3. 123. In French, the use of a term modeled on the Italian was impossible, for French had long ceased to turn participles used absolutely into nouns. A noun *glacé* would have been as impossible as the turning of *iced* in English into a noun. The new confection was called simply *glace*, "ice," this new application involving what was but a natural extension of its old sense. An interesting consequence followed in that, while *glace* in its new use made necessary a plural *glaces* in the sense of "different kinds of ice," this plural was not approved as correct by the Academy until 1762, and the use of the singular with the article *une* (*une glace*, a kind of ice, or a portion of ice) was still regarded as incorrect or better avoided till well into the 19th century.

3. 124. In England, the term *ice* was undoubtedly adopted, by translation, from the French—the more easily as it would have been the term that would naturally have been used had the confection originated in England. The point is immaterial, but adoption, rather than independent selection of it, is assured by the fact that the confection undoubtedly came to England from France, and by the obvious dependence of 18th century English cook-books upon French. It has remained in use in England as a generic term. Its use in the plural appears early—but, curiously enough, its use with the numeral-article *an* cannot be found before the 19th century. Sir



James Murray asked for quotations for "an ice" in *Notes and Queries*, VIIth series, IX, 3, 26, mentioning a friend who said he could distinctly remember when "an ice" was considered a vulgarism. Two correspondents supplied quotations for "ices", but this was not, of course, what Sir James Murray wanted. It had been customary to say "Will you take some of the ice (or "some ice")?" not "an ice", even though the ices were in individual portions or separate moulds.

### 3. 13. CREAM.

3. 131. *Cream*, in the compound term *ice cream*, was not used in its original, or primary sense.

\*The sense used was a transferred sense, peculiar to cookery. It had long been established in familiar use. The English record shows examples of it two centuries or more before the making of ices was practised.

\*The corresponding term *crème*, and, no doubt, the Italian *crema*, were similarly used in this transferred sense long before they were taken up into the terms applied to ices.

3. 132. The primary meaning of *cream* is the oily part of cow's milk, or that of other animals, which rises to the surface of standing milk, or is separated from the milk by skimming, or the modern "separator".

It is valued not only as the source of butter, but also as being more palatable than milk for eating with other foods or as an ingredient in cookery. The value set upon it is perhaps illustrated in the probable ultimate derivation of the word from Latin *chrisma*, consecrated oil used in anointing.

Various derived senses of the word originate naturally in the appearance and properties of cream—its application to the head of a fermenting liquid, the mantling foam of wine, the best part or refined residue of a thing (as in *cream of tartar*, the "cream" of a joke) and the like. None of these equals the derived sense employed in cookery in wide extent and importance of use, in virtue of which the word in this sense came to be treated with about the same freedom as if a separate word.

3. 133. The primary sense of *cream* will, hereafter, for clearness, be called "cream of milk", and the derived sense simply *cream*.

3. 134. The frequent use of cream of milk as a main ingredient in mixtures used in cookery led to the application of the word *cream* to such mixtures, or to any mixtures of like appearance or kind or use, or to substances resembling cream of milk, or similarly used.

The range of meanings under this sense of *cream* as a mixture includes:

(a) A mixture of cream of milk and other ingredients to give it body or flavor, such as eggs, starches, fruit or vegetable pulp or juices, essences, sugar, etc.

(b) A mixture of cream of milk, and milk, with other ingredients as in (a).



(c) A mixture of milk and other ingredients as in (a)—but without cream of milk except as contained in the milk.

(d) A mixture of like kind and use, made of similar ingredients,—characteristically eggs—except as not containing either cream of milk or milk.

(e) A substance made of nuts or grain resembling cream of milk in appearance, and used separately or in mixtures like the above.

This sense of *cream* still exists although somewhat supplanted by the word *custard* in its latest transfer of meaning.

To this brief will be found appended definitions of this sense of *cream* from modern standard dictionaries, with a selected series of citations in further proof and illustration.

3. 135. It must be noted that the date of the first appearance of the transitions of sense will not correspond in order of time to the several classes of mixtures given in logical order above—for direct transfer of the term at any time to any one of the classes was too easy and natural; furthermore, any of these might be in use a long time without chancing to be recorded in a work that has remained to us.

The earliest record we have of *cream* in these derived senses is of senses (c), (d), (e), in a work dating about 1430 (see list of citations). Citations for mixtures under groups (a) and (b) appear in the 17th century, but undoubtedly such mixtures go back centuries earlier.

How well established the general cookery use of *cream* was by the beginning of the 17th century may be illustrated by Bacon's use of it in connection with the newly-introduced grain, maize, of which he says, in his *Sylva Sylvarum* (1627), 49:

"Indian Maize hath (of certain) an excellent Spirit of Nourishment, but it must be thoroughly boiled, and made into a Maiz-cream like a Barley-Cream. I judge the same of Rice, made into a Cream."

In 54, he recommends using "Cream [of milk], or Almond or Pistacho-milk, or Barley, or Maiz Cream" as a partial substitute for butter or fat in "chuets", which were one of the earlier forms of mince pie.

3. 136. Derived senses of words are innumerable in every language, and their development is one of the most common ways in which the vocabulary is enlarged. To reprehend them, or to refuse to recognize them, if established in general acceptance, is wholly unjustifiable.

A few examples of similar derived senses may be cited in illustration, the list (which might be indefinitely extended were our vocabulary in general drawn upon) being confined to words denoting foods, or connected with cookery:

**Meat:** The original sense was food in general. This sense is still used archaically and in certain locations. But the derived sense is the one that is recognized.

**Flour:** Originally the same word as *flower*. Applied to any finely ground grain, then specifically flour of wheat, then to any substance

resembling flour because ground fine, *e. g.*, "manioc flour", "potato flour", "flour of mustard", "meat flour", "blood flour", "saltpetre flour", "sulphur flour".

*Meal*: Coarsely ground grain, hence "linseed meal", "beef meal", "blood meal", "bone meal", "calf meal", "bee meal", "gunpowder meal", etc.

*Salt*: Originally "common salt", extended to all kinds of salts.

*Milk*: Cow's milk, or the milk of other domestic animals; hence a substance or mixture used in cookery, such as "milk of almonds" or "pistachio milk"; or used in medicine or the arts, such as "milk of lime", "milk of sulphur", "milk of roses", "milk of wax", or milk-like substance in plants such as the "milk" of the cocoanut, of various "milk-bushes", "milk-trees", or other plants.

*Butter*: Originally and still, a familiar comestible and ingredient used in cookery, made from milk-fat—but also applied to mixtures of butter and other substances, and to substances or mixtures used like butter or resembling it, such as "almond butter", "apple butter", "mace butter", "shea butter", "bean butter", "fruit butter", "pear butter".

*Bean*: One of the various garden beans, hence, other seeds of like appearance, such as the "buck bean", "coffee bean", "locust bean", "Tonka bean".

*Currants*: Originally, a small variety of grape; transferred to other garden fruit.

*Soda*: Originally, and still, the carbonate of soda, but extended to the bicarbonate, "baking soda", and various compounds of sodium as "caustic soda."

*Ale*: Originally, and still, a fermented alcoholic liquor; also, beverage made by a mixture of this liquor and other ingredients, "buttered ale"; also extended to various non-alcoholic beverages, "ginger ale."

*Beer*: Originally equivalent to *ale*, then distinguished from *ale* when "hops and heresy" came to England (16th century) by being hopped; now the inclusive class-term for all kinds of malt liquor though also applied, as a secondary class-term, to distinguish lighter or heavier or darker malt-liquors. Also, a beverage made by mixture as "buttered beer". Also extended to various non-alcoholic liquors as "birch beer", "spruce beer", "nettle beer", "treacle beer".

*Brandy*: Originally, and still specifically, spirits made from wine or grapes, but extended to spirits made from various other fruits etc., as "blackberry brandy", "cherry brandy", "peach brandy", "corn brandy".

As *cream* in its transferred use comes to mean not only an article of food, but also a characteristic form of preparing it, a further series of examples may be given in which other words denoting forms of serving food have had their meaning transferred and extended.

*Bread*: Originally and still, specifically, a prepared article of food made of meal or flour, wetted, kneaded, generally "raised", and baked; hence, widely transferred to various preparations of meal or flour prepared more or less differently. Also applied to other be-

substances prepared or eaten like bread, such as "bean bread," "potato bread", the "native bread" of Australia; in Anglo-Saxon use, in the compound "bee-bread", honey-comb; in later use, the pollen, or pollen and honey, eaten by nurse bees.

*Loaf*: Originally, and still in local use, bread. In general use, a special shape of bread. In transferred usage, in cookery, a dish made by using a loaf as a casing, as "oyster loaf", "mushroom loaf", also, food prepared in the shape of a loaf, as "veal loaf".

*Paste*: Originally, flour and water, or milk, kneaded to a soft dough as used for various purposes in cookery—later, this compound with shortening as used in making pastry. Transferred to such mixtures as variously blended with other ingredients into sweets. Hence transferred to mixtures of similar consistency made of fish, etc., used as relishes, such as "anchovy paste", "bloaters paste", "shrimp paste". The use of the word to denote mixtures of like consistency outside of cookery (as *paste* for sticking things together) is derived from the use in cookery.

*Pie*: Originally, a dish of meat or fish cooked in pastry; transferred about the 16th century to sweet dishes of fruit, creams, etc., similarly baked in pastry. Compare *tart*, *pudding*, *jelly*, *blanc-mange*, *custard*.

*Tart*: Of similar history, except that tarts filled with fruit appear early beside tarts filled with meat, fish, cheese, etc. The word later became entangled with *pie*, the two being differently differentiated locally.

*Pudding*: Originally and still, a dish made by stuffing the stomach or entrails of an animal with various mixtures of meat, meal, seasoning, etc., and boiling the whole. Later, a dish made by boiling in a bag animal or vegetable mixtures enclosed in paste (see *paste* above). Later, such preparations, cooked in a dish by baking. Now, specifically, beside the older uses, a sweet of one of a wide variety of mixtures, cooked, or uncooked.

*Plum pudding*: Originally, a pudding with prunes as a main ingredient; later (from the 17th century) with raisins in the place of plums; hence, the common use of the word *plums* to denote raisins.

*Cake*: Originally, bread formed in a special shape and turned while baking; in local use, oat bread so treated; also widely extended to preparations of flour or meal, cooked in a flattish round shape, as "buckwheat cakes," or foods not made of flour or meal, so prepared, as "potato cakes", "fish cakes". Also widely extended as the name of a shape in application to other things than foods, as cakes of soap, tobacco, mud, manure, dynamite, etc.

Also, by transfer, fancy bread, prepared with the addition of various ingredients to give flavor and "richness." Widely extended to preparations similarly used not necessarily containing flour and not confined to a particular shape or mode of baking, such as the word *cake* originally predicated (consider the common phrase, a "loaf of cake").

*Cheese-cake*: A cake or tart with a filling of cheese, eggs, etc.

Still so made in the 19th century, but already by transfer, in the 18th century, a cake or tart with a filling of various creams, used as a sweet.

*Jelly*: Originally, a food made from the gelatin of meat; later, a sweet made by boiling and cooling fruit or vegetable juices with sugar.

*Blanc-mange*: Originally a rich meat-pie made with cream of milk, eggs, sugar, nuts, etc.; later, a sweet made with gelatin or isinglass; later, a sweet made simply with flour or milk, etc.

3. 137. *Custard*: This term, which belongs in the above list, demands special attention because of its encroachment in its later history upon the word *cream*. Originally it meant (1) a dish of eggs, cheese, and sometimes meat, baked with a crust; (2) a pudding made of eggs and milk and flavoring, etc., baked. Later (3) the word came to be applied to a mixture of this kind which is brought to a boil, but not baked, so that it remains fluid. This remains its ruling sense, though it is loosely applied to such mixtures used without scalding or boiling. Sense (1) remained certainly to the middle of the 19th century and may still be in use locally. Sense (2) is in common use, being specially indicated by the phrasal compound "baked custard". Sense (3) developed in the 18th and 19th centuries and came into conflict with, and partly superseded, the word *cream*, as denoting a mixture of the same kind, and, as often, similarly scalded, or as made with cream of milk or milk scalded before other ingredients were added. Hence its modern use in the phrase "frozen custard", referred to below.

3. 138. It remains to prove that the term *cream* in the compound *ice cream* was used in its transferred sense of a mixture, and not its primary sense of cream of milk.

(a) Ices of the cream kind have never been made of cream of milk alone. A mixture is and has always been used. If the basic ingredient is cream of milk only, which is exceptionally the case in the whole history of the product, there must be the addition of sugar, fruit pulp or juices or essences, as flavoring. These additions at once predicate the transferred sense of the word, and not the primary.

(b) To the French and English (and doubtless the Italian) cook of the 17th or 18th centuries, creams as mixtures were a familiar fact, and the word as a class-term for a wide variety of mixtures had become separated from its original sense. The new process merely involved taking such familiar mixtures and freezing them.

We may find difficulty in apprehending this, as the word *cream* in its transferred sense remains in somewhat limited use in special connections such as "cream sauce", "Spanish cream", "cream cake", "creamed fish" and the like, the word *custard* now largely taking the place of the former general use of *cream*. But at the time *ice* came in, this was not the case. At that time *ice cream*, ice of the *cream* variety, was simply one of the many well-known creams frozen and made into the new confection, "ice". It was no more conceived of as "cream of milk frozen, or made into ice", than



layer cake" is to our minds a special form of bread dough treated in a particular way, instead of simply cake made in layers with a layer between.

(c) In the third place, before the freezing of creams came in, the various creams were characteristically served cold, as are their modern representatives today, the soft custards. Directions that they shall be chilled appear in English, French, and (as soon as they are available) in Italian recipes. A noteworthy quotation may be cited here. In the *London Gazette* of 1688, No. 2383/2, appear the words, "All such Fruits, Iced Creams, and such other Varieties as the Season afford." This does not refer to frozen creams (if it did, the point under consideration would be established at once), as other references to frozen creams would appear before the much later date when they became common (after 1750). But it does show the practice of chilling creams, and makes clear how natural the transition from iced creams to frozen creams was. Note the use of the plural, as illustrating the frequent and familiar use of various mixtures.

(d) When recipes for frozen creams appear, the creams used are not merely of the same general character as the creams used before the practice of freezing came in, but are often practically the same.

(e) Further, after the practice of freezing came in, the recipes for creams generally contain the suggestion that, if preferred, they may be frozen. An interesting illustration is the Italian use of frozen *unc-mange*.

3. 139. It follows from this evidence that *cream* in the term *ice cream* is *cream*, a mixture, and not *cream* in its original sense of cream of milk.

The manner and reason of its use in the compound falls under the discussion of the compound as a whole which follows.

### 3. 14. THE COMPOUND.

3. 141. The classification of compounds—whether according to form (as combinations of noun with noun, noun and verb, adjective and noun, etc.) or according to the sense-relation between the elements (as of union, e. g. *copper-zinc*; place where, e. g. *country-house*; time when, e. g. *day-dream*; place whence or whither, e. g. *jail-departure*, *garret-stairs*, etc., etc.)—has been treated by many scholars, for example Bruggmann, Tobler, Wilmanns, Maetzner, Wundt, Schmidt, Sweet, Sayce, Kellner, Jespersen, and, most recently and fully, in relation to English, by Bergstens in his *Compound Substantives in English*, Upsala, 1911.

In a true, or close, compound noun, made up of two nouns, the two nouns are simply put together to express some idea into which both enter. According to the closeness of the relation between them, so that they are felt as forming one word, or the frequency of their use in this way together, the two elements of the compound are often written together or apart. Often words written separately are as closely compounds as if written with a hyphen or solid. There is an

indefinite gradation from such close compounds as *honeycomb* or *stargazer* to such phrasal compounds as "apple pie" or "city point-of-view." Attempts to define the nature of the relation between the elements in terms of grammar are largely fruitless so far as formulating any general rules are concerned.

For example, in the loose compounds *stone wall*, *cannon ball*, are *stone* or *cannon* adjectives or nouns? At a meeting of the Philological Society in 1881, Sweet and Sir James Murray said they were nouns used as mere adjuncts, Morris and Furnivall, both eminent philologists, affirmed them to be adjectives. Jespersen (*Mod. Hist. Gram.* 1914, II. 13. 11 ff.) argues that such elements of compounds are felt as adjectives. Bergsten argues that they are not truly adjectives, even though they can show one or another quality of adjectives on occasion, such as taking an adverbial modifier ("a wholly city point-of-view").

Bergsten is correct, but does not go far enough. The truth of the matter is that nouns as used are neither nouns or adjectives—they are nouns by origin, but, as so used, they become something neither noun nor adjective, namely elements in a compound. Has *pen* in *pen drawing* become an adjective, or is it felt as an adjective? It is, and remains, a noun in origin used in short-hand fashion for "made with a pen." The fact that in certain cases nouns so used may be used in the same way as adjectives placed before nouns are used does not prove anything with regard to innumerable compounds, in which the first elements in no wise are felt to be, or behave like, adjectives.

The simple fact is that English readily coins compounds by taking a word, noun or other, and placing it before another word. The word so placed stands for a whole phrase. The user has a clear apprehension of a relation between the two which he intends to express, and believes that this relation will be expressed to his hearer or reader. In some cases, the relation is so complicated, and the ellipsis of words understood is so difficult, that definition may be necessary, as, for example, such cases as *horse-power* or *foot-pound*. But in multitudinous cases, the combination is made, and the word is uttered and understood by the hearer, without any conscious reasoning whatsoever.

As English freely coins compounds with every degree of looseness and the widest freedom as regards the nature of the relation, it is not possible to say except in the broadest possible way that such and such types of compounds are English, and such others are not English. Great numbers of compounds may be ranged together as alike in form, and may seem to establish a "rule" or "type", but further examination readily discloses numerous partial or complete exceptions, which show that no "rule" really exists, and that the only factor in the matter is the instinct of the user with reference to the relation he means to express.

This applies even to the most well-marked natural tendencies of the language. For example, the natural order for compounds in English is, undeniably, for the class-term to come second, and the



defining or particularizing term to come first—thus in *coal oil*, oil is the class-term, and the word coal means “of like origin with coal,” that comes from deposits of coal.” But if, because of the meaning and relation of the terms involved, either can come first without confusion, or if a native model or a foreign model for the compound asserts its influence, English will readily abandon what might seem to be its well-marked “rule.” The freedom of English in this respect, its unembarrassed directness and decisiveness in sensitively obeying natural instincts, in place of subjecting itself to rigid conventions, has often been commented upon with admiration by foreign scholars from Grimm to Jespersen.

The facts stated above are pertinent in the present inquiry, because the compound word *ice-cream* is an apparent exception to a well-marked tendency in English compounds in one regard, and is a real exception, though one of a large class, to a well-marked tendency in phrasal compounds in another regard, that of its form.

3. 142. The class-term for frozen confections in their wide variety as, in the various languages concerned, “ice”—Italian *gelato*, French *glace*, English *ice*.

This term might often not be used, however, in the name given special kinds of ice for two reasons:

(a) Many varieties already had special names, namely, the beverages and creams already in use. The old names were naturally continued as special names.

(b) New materials, methods, recipes necessitated the invention of special distinguishing names. A large number of secondary class-names and individual names result.

Old class-names (like *cream*) for a time or in limited use tend to displace *ice* or to find a place beside it, reducing it to a limited meaning as the name of a special class, but in most countries, *ice* has retained its sovereignty as the inclusive class-name for frozen confections of whatever kind.

Italian has always used *gelato* as the inclusive term; French has always used *glace*; in England *ice* finally overcame *ice cream*; in Germany, *Gefrorenes* covers both water ices and frozen creams; in America, in spite of continued foreign influence,—the influence of English *ice*, and of French, Italian and German cook-books, cooks, and confectioners, and the natural tendency in such matters to assume foreign superiority, or borrow foreign terms as indicating novelty and fashionable approval—*ice cream*, because of the general preference for ices of the cream variety, has become in popular use the general inclusive class-name.

A review in detail of the terms used in Italian and French is here necessary to show the general development and explain the development of the terms used in English.

## 3. 1421. ITALIAN TERMS.

*Gelato*: The general class-name (cf. 3. 12).

*Granita* and *gramolata*: A subordinate class-name for a class of ices that developed by freezing beverages made of fruit-juices, especially lemonade, to a semi-soft and granular (whence the name) condition; served in glasses at social functions and in the morning at *caffes*.

*Sorbetto*: Originally, a frozen beverage like the *granita*, but distinguished from it by its wider range of ingredients other than fruit-juices, its smoother consistency, and as having more sugar. In this way the inclusion of the term blends vaguely with *granita* on the one hand and with the general family of *gelati* on the other, including *crema*, or creams. The characteristic feature of *sorbetti* is that they are semi-frozen.

*Gelato di crema*: Literally "Ice made of a cream". The term applies properly to all frozen creams, as *gelato di crema alla vainiglia*, *gelato di crema al pistacchio*, "ice of vanilla cream", "ice of pistache cream". The phrase by itself means "vanilla ice cream", for the reason that *crema*, by itself, came to mean, among the various creams, a cream flavored with vanilla, just as our *custard* (as used for earlier *cream*) might have come to stand for "vanilla cream", because of the almost invariable use of vanilla as a flavoring. Other creams, unfrozen or frozen, are usually called *crema* with a specific term added (see *crema* below) or *gelati* with a specific term.

*Crema*: A subordinate class-name, including generically the various "creams" used both frozen and unfrozen. The full term would be *gelato di crema*, with additional specificizing term, as noted above, but *crema* suffices by itself, unless it is desired to make clear that the frozen form is intended. Examples are *crema vergine* (a special mixture variously flavored), *crema al caffè*, *crema al cioccolato*, etc. Practically all the creams may be eaten either way, unfrozen or frozen to a preferred degree of hardness. The tendency to cite the practice of foreign nations appears even in Italy, where the making of ices started, as *crema francese alle mandorle*, *crema francese d'albicocche*, "French almond cream", "French apricot cream", *bavarese alla milanese*, "Bavarian cream in the Milanese fashion", etc.

*Ghiacciato*: The participial adjective *iced*, added to confections having a special name of their own, as *zabaglione ghiacciato* (wine, eggs, sugar, spices, etc., forming a punch which is beaten and iced or frozen).

*Spongata*: An ice made of beaten cream of like character with the Spanish *espuma* (froth), French, hence English, *mousse* (literally, froth, foam).

*Plombière*: An elaborate ice made with whipped cream, nuts, candied fruit, or the like; perhaps derived from French use.

## 3. 1422. FRENCH TERMS.

*Glace*: Literally *ice* (cf. 3. 12). This, in French, is the generic, inclusive term for all "ices". Use of the participial adjective *glacée* appears also, to permit a secondary specific term to come first, as in *crème glacée*. But *glace* is the primary class term. The official authority, the *Dictionary of the French Academy*, includes under *glace* liquids frozen and taken for refreshment, such as *glace à la crème*, *à la vanille*, *au citron*, *au chocolat*, etc. (i. e. ice of the cream kind, ice with vanilla, lemon, chocolate flavoring, etc.). So also cook-books. To cite examples, *Le Cannameliste Français*, 1768, includes under *glace* "frozen fruits, whipped eggs, mousse, cheeses (*fromages*), all kinds of frozen things of which we imitate the form"; the *Nouvel Manuel de Limonadier, Glacier, Chocolateur, et Confiseur*, 1851, says that glaces are confections made of different substances, vegetable ices, fruit juices, creams (*des crèmes*)".

*Glacée*: Literally "frozen", used when prominence is to be given to material or mixture used, or to the form used. For example, *fruits glacés*, *crèmes glacées* (in place of *glaces aux fruits*, *glace à la crème*), *fromages glacés* ("iced cheeses", that is, ices shaped like cheeses).

*Crème*: A cream-mixture—of any of the sorts in use before ices or invented later—as used unfrozen or frozen. When frozen, the confection may be termed *glace à la crème*, or, to specify this particular kind of ice, with the distinguishing term put first for prominence, *crème à la glace*, cream-mixture served as an ice, or *crème glacée*, cream-mixture frozen. If the freezing may be taken for granted, simply *crème*, with a further specific term, may be used, as *crème d'abricots*, *crème de citron*, that is, the same names as are used for such creams when unfrozen.

*Neige*: Literally, "snow": apparently a soft ice, especially, though not exclusively, a water ice, so named merely fancifully, as no special ingredients or manner of freezing seem to be indicated.

*Fromage*: Literally "cheese": An ice moulded like a small cheese, *fromage de café*, *fromage de fraises*, "coffee cheese", "strawberry cheese".

*Tortue*: Literally, "tart", indicating method of serving.

*Cannelon*: Literally, a mould, applied to the mould or form, and hence to the mass of ice moulded, as we use "mould of ice cream".

In French, used commonly with a specific phrase, *de chocolat*, *de fraises*, *de framboises*, as an accepted title, while in English "mould of chocolate", "mould of strawberry", "mould of raspberry" can only be used colloquially.

*Sorbet*: From Ital. *sorbetto*, sherbet, and similarly used for a soft ice, half a beverage, especially water ices, but also cream ices similarly used.

*Mousse*: An ice of whipped cream of milk, characteristically frozen without stirring.

*Frappé*: Partly frozen water ice, served soft and with a granular consistency like the Italian *granita*.

*Plombière*: A specific name of indefinite inclusion added to *glace* to denote more or less elaborate ices made with the addition of whipped cream, nuts, candied fruit, etc.

Two points in relation to the terms used in French demand special note.

(1) The use of *crème* is precisely similar to its use in English. It means a mixture, not specifically cream of milk, for it is used in the plural (*les crèmes*), with *une* ("a cream"), and with the demonstrative *cette* ("this cream"), and recipes for these mixtures state that they may be used either frozen or unfrozen. Cream of milk or milk need not enter into such mixtures; but in the case of a fruit mixture, eggs at least do, or it is not a *crème*, but a *glace à l'eau* (see below).

(2) The citations given below explain the origin of our term "water ice". Just as creams existed before frozen creams, so also beverages made of fruit juices—*eaux délicieuses*, literally "delicious waters". The term *eau* in French means not only water, but also juice of fruits or vegetables, and had also a wide application in professional medical use, and in the medicinal and culinary art of the expert housekeeper. The old use appears in French *eau de vie*, *eau de Cologne*, and in English "strong waters", "rose water". In English *soda water*, the use of *water* is derived from "mineral water", and its analogues; but the term as a whole has developed a wide range of inclusion, paralleling in a way the extension of "cream" and "water".

The word *water*, in the same sense of beverage, might denote fruit juice, of one fruit or of several mixed, with or without water. In Ribon's *L'Ecole Parfaite des Officiers de Bouche*, 1737, is an article telling how to freeze these *eaux délicieuses* into what we would call "water ices". The *Cuisinière Bourgeoise* of Toppens, 1759, says "in summer you take *eaux d'ete*, beverages appropriate to summer . . . place them in moulds, and, as they freeze, you take care to stir them from time to time". Cardelli in 1851 writes: "We distinguish between two kinds of mixtures for ices. These are fruit ices of the water kind (*glaces aux fruits à l'eau*) and ices made from creams (*glaces à la crème*). Fruit ices are made of sugar, water, and different fruit flavors . . . Ices of the cream kind are made of cream of milk, or of milk, of eggs, of sugar, and of different flavors."

### 3. 1423. ENGLISH TERMS.

The English terms are directly modeled on the French. The French terms which might serve as models were:

*Glace.*

*Glace à la crème.*

*Crème glacée.*

*Crème à la glace.*

The last had no general currency. It represents, as over against *glace à la crème*, the natural tendency to waver between giving precedence to the old confection, *crème*, now used also frozen, or the new confection, *glace*, when made of the old confection *crème*.

*Ice*: Used to represent French *glace*, and retained as a general term to the present day in England (see 3. 12), and, to a limited extent, in America.

*Cream*: The old use of *cream* for the various creams remains, and recipes commonly state that they may be used frozen or unfrozen. But the absolute use of *cream* for frozen cream, as in French *crème d'abricot*, etc., short for *glace à la crème d'abricot*, etc., is not common in English. Ices made from creams are called *ice cream*—"vanilla ice cream", etc.

*Ice cream*: (as a specific term): The English equivalent of French *glace à la crème* and *crème glacée* is ice cream.

In taking up the discussion of this term, it must be noted that French, in forming phrasal compounds, puts the general class-term first, the distinguishing or specializing term second. English does the reverse of this—except in a few cases like *court baron*, *gum tragacanth*. The normal order puts the class-term second, the term denoting kind first; for example, *mud-guard*, a guard that keeps off mud, *ice-pick*, a pick to pick ice, *pea-soup*, a soup made of pease.

In *ice cream*, we have apparently a reversal of this order. A class-term of what seems wider inclusion comes first; a class term of somewhat narrower inclusion second.

The exception is, in reality, only apparent, and the reasons for the order may be readily shown:

(a) The case is one of those where, both terms being class-terms, there is the possibility of either being taken as the main class-term and the other as the specifying term. The two terms, when the compound was formed, were evenly balanced, for *icé* in its new sense of a confection was not felt to be a term of wide inclusion. The compound might have been either *ice cream* or *cream ice*, so far as an adequate expression of the idea was concerned.

Which of two possible alternatives will be used will depend on the shade of emphasis in the user's mind. Examples may be given of similar cases in which both possible forms had currency for a time before one drove the other out. Bergsten (*Compound Substantives in English*, p. 57) gives a number of examples, to which others may be added:

bell-glass  
bug-bear  
comb-card  
cylinder-axis  
hook-bill  
jaw-foot  
lady-cow  
pike-hammer  
twin-brother

glass-bell  
bear-bug  
carding-comb  
axis-cylinder  
bill-hook  
foot-jaw  
cow-lady  
hammer-pike  
brother-twin



spring-head	head-spring
screw-jack	jack-screw
man-servant	servant-man
maid-servant	servant-maid
boy-scout	scout-boy
bachelor-girl	girl-bachelor
Queen-mother	mother-Queen
Empress-Dowager	Dowager-Empress
apple-john	john-apple
brandy-cherry	cherry-brandy
laurel-cherry	cherry-laurel
leaf-gold	gold-leaf
lion-ant	ant-lion
oak-holm	holm-oak
petre-salt	salt-petre
sugar-candy	candy-sugar
ledger-ambassador	ambassador-ledger
bed-rock	rock-bed
fossil-cork	cork-fossil
mole-rat	rat-mole
nettle-hemp	hemp-nettle
plate-silver	silver-plate
cake-yeast	yeast-cake
gall-nut	nut-gall
rock-soap	soap-rock
rock-salt	salt-rock
powder meal	meal powder

How naturally these alternatives may arise appears clearly in such cases as *bill-hook*, *hook-bill*, where both elements mean a tool, and it is indifferent whether you say a bill of the hook-kind, or a hook used like a bill—or in such cases as *gall-nut* over against *nut-gall*, or *salt-rock* over against *rock-salt*, where either element may have precedence over the other for the moment. Others are not so clear till examined into. A cordial made of cherry juice or pulp gets to be called *cherry*, and as made with brandy, *brandy cherry*, while on the other hand, brandy flavored by soaking cherries in it is called *cherry brandy*, and the two are used interchangeably for a while. *brandy cherry* may very possibly still be in use dialectally.

Of the two possible compounds in English, *cream ice* might have existed, indeed perhaps did. It is in use at present both in England and this country, but only in cook-book and trade use as a convenient parallel term to *water ice*. There is no evidence of its early use found in the record, and it may, with certainty, be regarded as a recent coinage.

(b) That *ice cream* should have developed rather than *cream ice* is readily explainable. Had the mixtures used, as well as the process, been new, *cream ice* might have been the dominant form. But in England, as in France, the word *cream* was familiar for the large



family of *creams*, which were by the new process made into the confection *ice*, in place of being merely chilled. A natural model for the new term existed in the names of these creams—"almond cream", "pistache cream", "lemon cream", hence naturally, *ice cream*. No difficulty was felt in the absence of a term denoting kind or flavor, for *cream* was used absolutely as we use *custard* in such phrases as "To make custard", "Will you take custard?", "To have custard for dinner."

Precisely the same influence in France led to the terms *crème glacée* and the rare *crème à la glace* beside *glace à la crème*. The influence of French *crème glacée* must also be reckoned with as influencing the English *ice cream*.

The reason for the order of the elements being clear, it is next necessary to explain the form of the first element—why *ice cream* and not *iced cream*.

Loose or phrasal compounds of the type participle plus noun are so numerous in English—*cut glass*, *burnt sugar*, *spun-yarn*, *cast-iron*, *fretted-work*, *moulded ware*, etc.—as to establish a fixed and powerful formative type. Unquestionably, if one were consciously to invent a term in a case like the one under consideration, one would naturally use this type—or even spontaneously and unconsciously, if one's mind were fixed upon a process employed and one wanted to stress that process—so, for example, a chemist might say to a class, "This is not smelted iron, it is sublimated iron" or "This is not cast or wrought iron, it is crystallized iron".

But numerous as such syntactic compounds are in English, they do not form the only, the necessary, or the inevitable type, in expressing such an idea, when the coinage is involuntary and unconscious—even in cases where one might think the desire to lay stress on the process might be instinctive and uppermost in the speaker's mind. For it may be quite as natural to think of the agency used, or state, or shape reached in the course of, or as a result of, the process concerned—in which case the result will be not participle plus noun, but noun plus noun, as in "open-hearth steel", "pig iron". In the special case, any one of a number of factors may subordinate the idea of the process, so that the use of the participle, seemingly so natural, does not take place. In order that it may be clearly realized that such compounds are perfectly natural, and have been in the past and are at present used frequently in English, a list of illustrations may be given—especially as, in individual cases, such compounds are sometimes regarded ignorantly as incorrect, and are "corrected" by would be purists:

*Ice water*: not "short" for "iced water", but "water of ice", "water from ice", "water with ice in it", "water cooled by ice". Often regarded as "incorrect", the use of *iced water* being urged as the logical and correct term.

*Brandy cherries*: "cherries in brandy"; used beside *brandied cherries*, which is now the recognized term.

*Jelly blood*: "blood that has become a jelly"; equivalent to *jellied broth*.

*Lump sugar*: "sugar made into lump form".

*Loaf sugar*.

*Layer cake*: this would be equivalent to *layered cake*, if an active verb "to layer" in the proper sense existed. Note the free simplicity of the formation, *layer* being used to indicate briefly a complicated process.

*Butter ale*: used beside *buttered ale*.

*Buttermilk*: "milk" left when the butter has been separated from the cream by churning, or, now, whole milk converted to a beverage resembling the original buttermilk by addition of a ferment.

*Butter toast*: used beside *buttered toast*.

*Jam tart*: i. e., filled with jam.

*Roll bread*: i. e., in the form of a roll.

*Roll brimstone*.

*Roll candle*.

*Roll tobacco*.

*Bottle ale*: used beside *bottled ale*, the stress being here on the ales being in bottles, instead of bottled from the cask.

*Meal malt*: "malt reduced to meal".

*Meal powder*.

*Plug tobacco*.

*Powder beef*: beside *powdered beef*.

*Powder sugar*: beside *powdered sugar*, the sense here being "sugar in powder form".

*Loaf bread*.

*Brick oil*: oil with brick in it, formerly used as a drug.

*Button mushroom*.

*Bead amber*.

*Mince meat*: used beside "minced meat", but not "short" for it, the sense being "meat reduced to a mince".

*Soap ashes*: ashes for making lye for making soap.

*Bean ore*: ore in a form like beans.

*Pea coal*.

*Egg coal*.

The list might be almost indefinitely extended.

A special note is necessary on the cases in which a participle plus noun phrase appears beside a noun plus noun phrasal compound. Where such pairs appear, the error is sometimes made of supposing that the latter is necessarily derived from the former. It might be so in an individual case, but is by no means necessarily so in every case. The point is touched upon because the *New English Dictionary*, after defining *ice cream* adds "(Earlier term, *iced cream*)". If this is intended to mean that *ice cream* was derived from *iced cream*, by a dropping of the *d*, it is an error. If it means that there were two alternative forms, and that *iced cream* was the earlier, it is, so far as appears from the record, also an error, for they appear simultaneously. If it means that there has also been use of the form *iced cream*, the statement is correct in substance but not in form, as *iced*

*cream* does occur, but very rarely indeed, and plainly as a translation of French *crème glacée*. The note should read "Also, in former use, *iced cream*."

The list of examples makes it clear why the term adopted took the form *ice cream* and not *iced cream*. Two conceptions had to be combined to form a distinctive class-name. One was the old and familiar conception of the various *creams*. The other was the new confection termed *ice*. The assumption uppermost in the mind of the users was not "a cream that has been iced" but "a cream made into ice". From this standpoint, *cream* is naturally the class-name, and *ice* the defining term. There are ordinary creams on the one hand, and ice creams on the other. The feeling is much the same as in *liqueur brandy*, a brandy designed to serve as a liqueur, or as if, on the introduction of *soufflés*, a housekeeper, with the general class of custards or puddings in mind should think of "soufflé custards", or "soufflé puddings", as a new class.

*Ice cream* (as a generic term): Not only was *ice cream* preferred over a possible *cream ice*, but it also came to be used as a primary class-term, beside, and used in the same way as, *ice*. This is wholly natural, for the reason that *cream* might denote a mixture with no *cream of milk* in it or even *milk*. In French use, a *crème*, to be so called, had, apparently, to have in it at least eggs with fruit-juice or other ingredients. But in English no such distinction seems to have stood in the way. In the 18th century, the term *ice cream* was used of any kind of ice. Thus, in 1786, in the noted cookery-book by Mary Smith, *The Complete Housekeeper and Professed Cook*, *ice cream* is the general term under which are grouped raspberry ice made with cream of milk, and orange, peach and apricot, all of them what we would call "water ices". So also in 1791 Miss Frazer includes under *ice creams*, apricot, pineapple, and peach water ice.

In England, *ice cream* continued to be used as a primary class-name, beside *ice* and *ices*, but never succeeded in usurping priority over *ice*, owing to the fact that both terms were used as secondary class-names (*ice* tending to mean *water ice*), and also to the fact that use of frozen creams was less common than the use of water ices. In America, the conflict for priority was decided the other way. Starting from the early use of *ice cream* to cover any kind of ice, the general use of frozen mixtures containing cream of milk or milk gave this term the advantage, so that in America it is the accepted primary class-term—one has "ice cream" for dinner, one goes to get "ice cream" at a confectioner's, though in both cases the order may be for what are now called specifically "water ices". This is a fact, which will at once be recognized, though not noted in American dictionaries (see discussion of these definitions below, 3.22).

*Water ice*: The development of the French phrase *glace à l'eau* has been explained above. Though it appears in 18th century French works it has not been found in English works of the 18th century.

Presumably its use in English in the 19th century grew out of a necessity to particularize special classes by secondary class-terms, as

the term *cream* began to lose its wide and general use in the sense of a mixture. This was due to the encroachment of *custard* in its newly developed application to many mixtures earlier called *creams* (see above, 3.137). *Ice cream* partly ceased to cover naturally all kinds of ices, and a tendency rose to specialize *ice* in a secondary sense to mean ices made with fruit-juices and other watery mixtures, and to understand *ice cream* as meaning specifically ice made with cream of milk or milk mixtures. This is often the understanding in America at present. But to use a general term as a secondary term is not specific enough. In England, the adoption of *water ice* provided parallel secondary terms, *ice cream* and *water ice*, under the general class-term *ice*. In America, the general class-term *ice cream* was used also as a secondary term for cream of milk and milk mixtures, and *water ice* came into use to parallel the secondary sense.

*Frozen custard*: This further secondary sense, the use of which is very common in America, rose in consequence of the modern development of the word *custard*, covering, and in part supplanting, the older word *cream* (see 3. 137).

*Custard* specifically denotes a dish made by scalding milk and pouring it hot into beaten yolks of eggs, to which sugar and salt have been added, the mixture, when cold, being flavored, and the whites of the eggs, beaten and stiffened by cooking, being dispersed decoratively on the surface.

Examination of the recipes, old and modern, will show that the essential processes used in making *custard* enter into the making of *ice cream*. The domestic practice of freezing plain milk-custard, with cornstarch as a thickening, has led to a tendency to differentiate "frozen custard" from "ice cream" on the supposed basis that frozen custard has eggs in it and ice cream has not. The difference in flavor, which many persons dislike, is in part due to the taste of the yolks of eggs, not made up for by judicious flavoring, partly, indeed chiefly, to the taste due to the scalding when not rightly corrected, partly to the use of cornstarch as a thickening, often to the plainness of the mixture as often made. Both scalding and the use of yolks of eggs enter into the making of most sumptuously rich and expensive ice creams, which meet with cordial approval from the very persons who dislike what they would term "frozen custard", and whites of eggs are commonly added to the ice cream most generally approved by authors of American household cook-books, the so-called "Philadelphia ice cream".

There is no ground for regarding any "frozen custard" as not ice cream, however poor in flavor it may be. Frozen custard, of whatever kind, is ice cream; and poor "frozen custard", that is not agreeable to the eater, is merely poor ice cream.

*New York Ice cream*: A term peculiar to America formerly (and still, to some extent) applied to ice creams made with milk, eggs, cornstarch and sugar. Sometimes, but exceptionally, cream of milk was added to the mixture before cooking or to the "custard".

*Neapolitan Ice cream*: A term applied to a class of exceedingly rich creams made with boiled custard (milk, or cream of milk, yolks



of eggs and sugar), to which cream and flavoring is added when cold, or the beaten yolks of eggs in place of cream. With proper flavoring, the so-called "custard" taste is wholly unperceived. This general type of ice cream is the basis of some of the richest ice creams made. (See *French Ice cream* below.)

In current American trade and popular use: ice cream in "brick" form in three or more layers variously colored and flavored, often with a layer of water ice. In this use the term does not specify any particular kind of ice cream nor any special flavors, but only the form in which it is put up. Specification as to kind results in other phrasal compounds, as *French Neapolitan Ice cream*.

*French Ice cream*: An American trade term which, in both trade and popular usage, has largely supplanted *Neapolitan Ice cream* as the specificizing term for the class of ice cream made with milk, or cream of milk, yolks of eggs and sugar; more especially ice creams of this class so managed in the freezing process as to make them heavy and exceptionally smooth.

*Philadelphia Ice cream*: A term peculiar to America sometimes used—not uncommonly in cook-books of comparatively recent date—to specify ice cream made of a mixture into which cream of milk enters only or, if the cream of milk is very "thick", a proportion of two quarts of cream of milk to one pint of milk—as distinguished from the many mixtures used. The cream of milk may be scalded, but no yolks of eggs are used, though the beaten whites of eggs are sometimes added.

*Special terms*: Further comment is not necessary in regard to such terms as *sherbet*, *mousse*, *frappé*, *plombière*, etc., their use in English not differing in essentials from their use in French. In cook-books, some tendency to use *sherbet* as a class-term for water ices appears, though in general acceptance *sherbet* is still a water ice served as a soft ice, half a beverage—for example between the courses of a dinner: see the discussion of cook-books below.

### 3. 2. PRESENT USE.

3. 21. Evidence as to the origin and history of a term may not in itself suffice. This evidence must be tested, and, if necessary, corrected, by available evidence as to the use of the term in actual life, before complete understanding of present American use is formulated into a definition.

Such evidence will fall under the following heads:

(a) Definitions in standard dictionaries of recent date. (3. 22).

(b) Use of the term in recent or current literature. (3. 23).

(c) Familiar use and understanding of the term by the average person. (3. 24).

(d) Technical or other expert use. (3. 25).

(e) Dialectal and cant uses. (3. 26).

## 3. 22. DICTIONARY DEFINITIONS.

3. 22. The standard dictionaries of recent date are the *New English Dictionary* of the English Philological Association, the *Webster* of 1913, the *Century* dated 1913, and the *Standard* of 1913.

The *New English Dictionary* represents British usage in general, taking account of only the most marked deviations in American usage. From the historical standpoint, it is the greatest work of reference ever published in any language. Its definition notes *ice* as the primary class-term including ice cream and water ice, and under *ice cream* it covers the variety of mixtures which contains milk or custard, its definition of *custard* covering mixtures of milk and eggs. Its definition of *ice cream* is at fault only in that it fails to note the use of the term in the 18th century as a primary term covering all classes of ices in the same way as *ice*.

The definitions in the three recent standard American dictionaries note the use of *ice* as a primary class-term to cover ice cream and water ice, but fail to note the characteristic American use of *ice cream* as the primary class-term. This is due to dependence on cook-books, British and American—the American cook-books often following the British (see 3. 253). The omission of so characteristic an American use is an error similar to that which leads to inclusion of British definitions of bird-names and failure to note use of those names for American birds. The fact that in America *ice cream* is universally used as the primary class-term may well rest on the indisputable evidence of familiar knowledge cited under 3. 24 below.

If in error in this omission, they are not in error as regards the variety of mixtures included under the term *ice cream*—their definitions indicating the use of cream-mixtures and custards, in full accord with the testimony of cook-books and household usage in America.

A further slight error may be noted in the *Standard*, the only dictionary which defines "Neapolitan ice cream". It gives the comparatively recent American application of this term to specify an ice arranged in layers of different colors, but fails to note its historical and specific application to ices made of rich custards as explained above.

A note may be added upon a point that is not trivial, although immaterial to the chief object of this discussion. Attention has already been called to the possible inaccuracy of the historical statement in the *New English Dictionary*, "Earlier term, iced cream." The *Century Dictionary* prefixes to its definition of *ice cream* the statement "Strictly iced cream." In view of the historical explanation of the formation of the compound, this statement is incorrect.

## 3. 23. RECENT AND CURRENT LITERATURE.

3. 23. This brief includes by general reference recent works and current references in the periodical press in support of the contention that *ice cream* in American usage is the primary class-term.



covering ices of whatever kind. Citations are not necessary, as such references are fully in accord with the evidence under the next head. The term *ice* or *ices* may appear in advertisements, cook-books, etc., but only as aping British and other foreign use.

### 3. 24. FAMILIAR USE.

3. 24. Familiar use and understanding of a term by the average person must be taken into careful consideration, because this may differ from the historical or technical use, and the law, in seeking an accurate definition, will aim to prevent the average person's committing or suffering wrong because of his ignorance.

In many cases, a person selected at random will have an incorrect, or only partially correct, understanding of a term—and a correct understanding will be found only among specially well-informed persons. For example, all know what *bread* means, but only a limited number could accurately define *corned beef*, and very few *sauce Tartare*. To take an instructive example, few persons except housekeepers in the United States know that mince-meat is often made without meat, and persons who have often eaten mince-meat made with meat will guess the percentage to be anywhere from 5 per cent. to 35 per cent.

No serious conflict exists between popular understanding and actual meaning of the term *ice cream*. Ice cream is so familiar an institution in the home, in the street, at the confectioner's—and, the home, the male, as well as the female, members of the household, so generally engage in making it—that appeal can confidently be made to a universal understanding of its meaning. The dish is called typically *ice cream*, irrespective of its kinds, whether a cream-mixture or water ice. One makes "ice cream" for dinner, one goes to the "ice cream parlor" or confectioner for "ice cream," one buys of the "ice cream man" in the street. In any of these cases "ice cream" may mean or include water ice.

Further, it is a fact universally known that the term *ice cream* covers a wide variety of mixtures. It is known that very rarely indeed, even in households that could well afford it, is *ice cream* made with cream of milk alone, because of the cost and as being so rich. It is very generally known that the amount of cream of milk may be varied according to the other ingredients used. It is very generally known that the addition of whites of eggs improves smoothness and that the addition of yolks enriches the mixture and improves its color. It is everywhere known that there is a gradation from rich mixtures down to use of milk only, in which cases common domestic use cornstarch is added, and the mixture is brought to the boil. This, the poorest form of ice cream, is called "frozen custard". The only popular misapprehension is, as explained above, that the flavor disapproved of in this type of mixture is due to the presence of eggs, whereas it is due to the scalding or boiling in particular, to the presence of cornstarch, if used, and to the lack of compensating richness or intensity of flavoring, to the boiled taste.

## 3. 25. TECHNICAL USE.

3. 251. Technical use, that is use of the term by persons having special or expert knowledge of methods involved, may be held here to include its use:

- (a) By expert housekeepers.
- (b) By professional cooks.
- (c) By scientific experts in cookery.
- (d) By confectioners, and other manufacturers.

3. 252. The first two classes may be conveniently taken up together. The special knowledge of methods and recipes of expert housekeepers and professional cooks leads to no different use of the term from its general and popular use. They will have a more accurate knowledge of the proportions of mixtures, the uses of eggs, the difference between "plain" and "rich custard", and a more or less wide range of the innumerable fancy ice creams and frozen puddings with these names. But their use of the term is in nowise different from the general use.

3. 253. The same is true of scientific experts in cookery.

A special word is necessary here as to the evidence afforded by cook-books.

Cook-books, like other text-books, are built upon their predecessors and represent traditional usage. In addition, they constantly draw upon foreign cook-books, English and French, more particularly. A result of this is the use in some books of the characteristic British *ice* and *ices* for all ices. In others, the term *ices* is used to denote *water ices*. In others, no inclusive term is used as a heading. To give examples: Mrs. Lincoln uses "Ice cream and Sherbet", Mrs. Rorer "Ice creams and Sherbets", Mrs. Farmer "Ices, Ice creams, and other Frozen Desserts", Mrs. Berry "Ice cream and Ices", J. M. Hill "Ices". But in the text of these articles the familiar American use may appear. For example, Mrs. Lincoln, who heads her chapter "Ice cream and Sherbet", explaining that sherbet is water ice, uses *ice cream* none the less in its American generic sense (p. 546): "Fancy ice creams depend largely for their right to this name, upon the moulding. Any good recipe for a cream ice or water ice may be used."

As regards the range of mixtures, varying from those with cream of milk only to plain custard, the testimony of the cook-books is absolutely uniform.

Incidentally it may be added that in recent cook-books the number of special and fancy terms for particular kinds is largely increasing, including the French *parfaits* and the term *granite* derived from Italian *granita* directly or through the French.

This brief includes by general reference all American cook-books of recent or older date, in support of the definition of American use given below. (3. 3.)

3. 254. *Trade Use*.—This is used to cover all manufacturers, whether dealing in large quantities as wholesalers, or for their own

retail trade as the larger number of confectioners, restaurateurs, or caterers.

The trade use corresponds to that outlined above and defined below.

The article as a trade article is called *ice cream*. The term appears on signs, in advertisements, on bills of fare, on lists of varieties (including both cream ices and water ices) for the choice of customers, and as the general term in trade-reference as *The Ice Cream Trade Journal*.

In general, to the manufacturer the wide range of fancy names exist only as specifying varieties of certain staple kinds, these varieties differing only in form, special flavoring, method of service, or the like—the exception being where the name applied is understood as specifying a particular kind of mixture not included among the manufacturer's staple varieties. For him, *ice cream* divides into *cream ices* and *water ices*. Under water ices, fall those ices not made of cream-mixtures or custards—he subdivides them into four main classes, sherbets, granites, frappés, and punches. The cream ices are made of creams or custards. One class is made without stirring while freezing: this includes mousses, biscuits, and parfaits. The other class is made with stirring: this includes all the range of mixtures from "Philadelphia (or "straight cream") ice cream" through those made with various mixtures of cream of milk and milk. In any or all of these, he may use eggs in such a way as to make a custard, or otherwise in a way to ensure certain definite advantages—the white of eggs to ensure cohesion and smoothness, a modicum of yolk to take off the raw whiteness of white ice creams, as is done also by expert private housekeepers. Even in "Philadelphia ice cream", generally supposed to be without eggs, white of egg is added by some; this also is done by private housekeepers as an individual practice, as appears in cook-books. The most radical changes of recent years, generally accepted as good practice are:

(a) The giving up of the scalding of the cream of milk and milk (except in the making of ice creams of the so-called "custard" type, and even for these the cream of milk is no longer scalded as a rule)—due in part, no doubt, to the growing practice of pasteurization, but chiefly to the desire to avoid the scalded taste as unpalatable and therefore unpopular. Cream of milk similarly is seldom now scalded in private practice, though the cook-books direct scalding.

(b) The use of condensed milk (and, quite recently, milk powder) to give the desired "body" and "texture," supplanting to a large extent the use of egg yolks and starches for like purpose, and so satisfactorily meeting a growing preference for ice creams without a cooked taste. Similar use of condensed milk is not unusual in household practice and is noted in some cook-books.

(c) The use of a modicum of gelatin (or, more recently, vegetable gum), in place of whites of eggs and starches, to ensure cohesion and smoothness. This use of gelatin is noted in some cook-books, but its use in private practice, while not uncommon, is not as general as the trade use—due, without doubt, to the fact that ice cream

made in the household is so quickly consumed that there is less need of a "stabilizing" ingredient.

### 3. 26. DIALECTAL AND CANT USES.

3. 26. There are no cant or slang uses. Dialectic uses are confined to the differences between British and American usage, as regards the primary class meaning of *ice* and *ice cream* respectively, which have already been explained with sufficient fullness.

### 3. 3. DEFINITION OF AMERICAN USE OF THE TERM "ICE CREAM."

We reach now the following result: The history of the rise and use of the confection, the derivation of its name in English, French and Italian, the history of the use of the term from its origin to the present, the evidence afforded by standard dictionaries (except that they fail to note its universal use as a primary class-term in America), its use in current literature, the testimony of cook-books, the understanding and application of it by professional cooks, by private housekeepers, by manufacturers, and finally the universal popular use and understanding of the term, all coincide in confirming the accuracy of the following definition:

#### I. SPECIFIC USE.

Ice cream is a confection, or prepared food served as a delicacy, consisting of one of various "creams" or mixtures, as further defined below, frozen to a more or less rigid consistency in a suitable vessel or special contrivance, whether by packing in a freezing mixture (usually ice and common salt), or by air, brine, etc., chilled by modern appliances, or by other methods, with or without agitation or beating, during the process of freezing, by means of a dasher or similar contrivance, to ensure smoothness and the desired consistency.

**BASIS OF THE "CREAM" OR MIXTURE:** The basis of the "cream" or mixture may be a "cream" (as now understood), or a "custard" (in its recent sense, custards having been formerly also called "creams"), whence come two typical kinds of the confection.

(a) A cream as the basis of the first type, may have, as its basic ingredient either cream of milk only, preferably not too thick, in which case thinning with milk is advised to prevent over-richness, the product when thus containing a high percentage of butter-fat being termed "Philadelphia ice cream", (or, commonly in trade use, "straight cream ice cream") or cream of milk and milk, or cream of milk, milk and other ingredients—as condensed milk, eggs, etc.—, or milk and other ingredients, in proportions to produce a mixture of desired or available character as regards richness, healthfulness, or cost, varying from a high cream of milk content to plain milk. In the latter case, consistency is gained by adding whole eggs or egg yolks and often cornstarch, and bringing the mixture to a boil pro-

ing a custard, which, when frozen, because of its characteristic is often called "frozen custard". This, as a cream with a custard is forms a connecting link with the second type, from which it is distinguished by lack of richness.

b) The second type of ice cream uses as its basis a custard of a red degree of richness, made of cream of milk, milk, and eggs, brought to the boil, the product being specifically known in cook-books as "Neapolitan ice cream" or "custard ice", and in trade as "French ice cream" or as "frozen custard", according to the method employed in freezing. It is characteristically employed for elaborate fancy ice creams, "frozen puddings", etc., and includes among its varieties some of the richest ice creams.

USE OF EGGS: Eggs enter as above into all custard mixtures. To form mixtures, the whites of eggs may be added for cohesion and smoothness, and a modicum of yolk for color, as individual preferences may direct. This use of eggs, in both domestic and trade use, extends even to "Philadelphia ice cream", popularly supposed to be without eggs.

SWEETENING AND FLAVORING: The mixture, further, is sweetened and flavored, the flavoring consisting of essences, such as vanilla, or liqueurs, and fruit juice, fruit pulp, etc.

ADDITIONAL INGREDIENTS: There may further be added solid substances, as contributing to the flavor, or as diversifying the consistency, or as delicious in themselves, such as whole or ground nuts, dried fruit, powdered cake or bread, etc. When the confection consists chiefly of such solid substances held together by ice cream, a special class of *ice cream* results known as "frozen puddings". There may further be added, as a "stabilizer", in place of the whites of eggs, a small amount of gelatin or vegetable gum. In trade practice such addition is universal in ice creams of the first type described.

CHARACTERISTICS OF THE FINISHED PRODUCT: After freezing, as described, the confection may be served in the mass, or specially moulded into "bricks" or other shapes, or variously ornamented. In respect to its uses, ice cream is a sweet dish, made and valued for its palatability, due to its flavor, consistency, and agreeable coldness, and for its attractive appearance to the eye, as the result of its frozen state, or as colored by its ingredients, or as specially decorated, or as arranged in layers differently colored, or as shaped in various forms by moulds or otherwise, or as decorated with fruits, jelly, cake, or other edible or non-edible ornamentation, or as varied in any way which taste or fancy may dictate.

## II. USE AS A SECONDARY CLASS TERM.

In its natural development from the above sense, *ice cream* is used as a secondary class term, as meaning a kind of ice cream (as above defined). In this use, it forms a plural "ice creams", may take the indefinite article, "an ice cream", or a demonstrative pronoun, "This ice cream is better than that".



In this sense, it is employed as a parallel term, in general use beside *water ice* denoting ices not made with creams or custards as a basis, or as a parallel term with *ice* in the special sense of *water ice*. In this sense, it has a synonym *cream ice*, in cook-book and trade usage, recently coined on the model of *water ice*. In limited, chiefly cook-book use, it is sometimes placed parallel with *sherbet*, applied as a class-term to denote *water ice*.

### III. USE AS A PRIMARY CLASS TERM.

By a natural development of the national preference for *ice cream* (Sense II) as against water ices, in American use, *ice cream* is universally employed as a primary class-term for all kinds of the confection as forming a class with the meaning:

Ice cream (sense II) or water ice as referred to without specification of kind.

Examples: "An ice cream freezer", "*The Ice Cream Trade Journal*", "An ice cream parlor", "To order ice cream for dinner", "We have ice cream every Sunday".

In this sense, the term has as a synonym the term *ice*, and *ices* limited in America to book-use or as an individual adoption of British use, in which *ice* or *ices* is now the accepted primary class term, though in the 18th century a use of *ice cream* like the American use was found.

Though so characteristic and universal an American usage, this sense is not noted in American dictionaries.

### 4. THE DEFINITION FROM A LEGAL STANDPOINT.

4. 1. The above definition is an attempt to state facts with, as nearly as possible, scientific fullness and accuracy. It is a philological statement. What consideration, supposing it to be complete and accurate, does it merit in a legal relation?

In discussing this question, the student of language does not presume to step outside his domain and assert what should or should not be a legal definition. On the other hand, he may with propriety assert that the law, if it be the law, and not an arbitrary assumption of legal power, shall not trespass outside its proper bounds into the province of philology and frame an inaccurate definition contrary to the facts and contradicting right judgment.

In other matters of scientific fact, the law does not presume to determine. It could not and would not rule that the sun goes round the earth or that a flower or animal shall be considered as belonging to a particular genus to which it does not belong. In the case of the meaning of a given term, however, it is not so easy to see that the law cannot arbitrarily alter or modify accepted use, or infringe the right of a person to use it in its proper accepted meaning. None the less, the accepted use of a term is as much a fact of nature as the constituents of a given chemical compound. As such it is extrajudicial, and outside the power of the law to determine.



Nor does the law presume to determine it. Legislators may so presume, but such action is not in accordance with the law. If the question of the place of the earth in the solar system or the genus of a flower came before the law in a legal relation, it would be decided by appeal to scientific authority, and if the facts were not known in any individual case, they would have to be ascertained by scientific methods. So similarly the definition of the meaning of a word. It is well known that in foreign countries questions of language—meaning and usage—are settled by prescription, but they are so settled by a properly constituted scientific tribunal. Lacking an official tribunal, the law should take process upon such a statement of conclusions as the above definition, supported by presentation of the historic evidence from which those conclusions were derived, and exposition of the methods and principles employed in reaching them.

4. 2. It is plain that any scientific conclusion with respect to the meaning of the name of a thing cannot be of force or come into consideration, with regard to what the law may rule as regards the thing itself. For example, if it came to be recognized that the drinking of beer or wine or spirits were detrimental to the general interests of society, the legislature might act to terminate or restrict the drinking of these liquors. But if, while legislators were doing this, they should presume to tamper with the names of these liquors, and should ordain by statute that *beer* should hereafter be applied only to a malt liquor of not more than three per cent alcohol, such an enactment would be purely arbitrary. On the other hand if a brewer should attempt to sell a so-called "beer" of twenty per cent alcohol, a Court might at once put a stop to it, basing its decision on the history and present acceptance of the term *beer*. The fact of the meaning of *beer* would be taken into account in the decision precisely as any other fact of nature would be in a case of different kind, for example the analysis of an ore under dispute.

4. 3. The above definition aims to supply the information which should be the basis of any law relating to the meaning and use of the term *ice cream* or to the composition of ice cream.

\*In questions of the kind under discussion, the law in the interests of the public should first ask:

Is the substance or product sold under a given name properly included under that name?

Obviously, if it is not what the name calls for, a fraud is being committed, and the law should intervene; but if the product sold is what the name calls for then no fraud is being committed and there is no reason or excuse for interference on this ground.

\*However, even when the product sold is what the name calls for the law might properly inquire as to the suitability of the substance or product itself, and its next question is:

Is the product in any way prejudicial to health because of the presence of any of the ingredients called for or permitted by the name?

If the answer is in the affirmative, then the use or future disuse

of such ingredients is properly subject to a legal enactment,—either regulatory or prohibitive.

It is at this point that legislation often goes seriously astray. Acting on private judgment, on a superficial knowledge of the facts, or without taking into account the economic aspects of the matter as regards consumer and manufacturer alike, the persons responsible for such legislation sometimes fix arbitrary standards.

An illustration of this important point is afforded by the legislation concerning mincemeat. It is suggested that a standard of ten per cent meat content be fixed legally on the supposition that mincemeat recipes in private and domestic use contain roughly on the average ten per cent. This suggestion fails to take account of the fact that recipes for private use are for small quantities that may be used quickly or may be at intervals dosed with spirits, whereas if a manufacturer used ten per cent meat content, he is constrained to use a high percentage of spirits, or artificial preservatives. There is the further error that mincemeat is thought to be valued for its nutritive qualities, whereas, except in lumber camps or similar use (and even there), it is valued as a sweet dish—and that the entire history of mincemeat shows a decrease in meat content and increase of fruit content, as fruit became more plentiful and inexpensive, because of superior palatability, to the point of discarding meat altogether. There is again the further error of supposing that meat is generally used in mincemeat in America, whereas some thirty per cent of housekeepers in America, and nearly all in England and the British possessions, do not use it at all.

4. 4. The above definition aims to supply the information necessary to answer the questions, as stated above, which may properly be asked by the law. It has been pointed out that legislators may easily go astray in fixing an arbitrary standard, though with the best intentions. But they may commit a still more serious error, and ordain that a manufactured product shall not bear the name usually applied to it unless it conform to that new and arbitrary standard. This may not only be to the prejudice from an economic standpoint of the best interests of the consumer in general, but is also in contradiction of the law, which cannot arbitrarily modify the accepted use of a term in contradiction of the facts of accepted usage. To cite again the illustration used above, legislation fixing a definite percentage of meat in mincemeat should unquestionably be declared illegal.

4. 5. It remains to apply these questions to the question of the determination of the ingredients of the confection, ice cream, with which this brief is concerned.

\*The above definition attempts to state the actual facts as regards the meaning and inclusion of the term.

\*Any attempt to limit the meaning of the term *ice cream* to a narrower inclusion by an arbitrary ruling would be as unwise and as unjust as it would be flatly in contravention of the historic and present acceptance of the term.

When, with purity (freedom from ingredients not called for by

name), wholesomeness and possibility of deception in mind, the individual legislator, committee, commission, or other person or body, considers the desirability of creating a standard for ice cream in the public interest, and it is ruled that ice cream should consist of cream of milk alone with sweetening and flavoring, the arguments urged are:

1. The term *ice cream* calls for cream of milk.
2. The admission of eggs causes the compound to be a custard.
3. The use of cream of milk makes the product more nutritious, and therefore more wholesome.
4. Enforced use of cream of milk will prevent the manufacturer, including the manufacturing retailer, such as the confectioner and caterer, from using less costly substitutes for it.

An examination of these arguments will show, so far as the interests of the buyer or consumer are concerned, that not one of them is justified as regards the meaning of the term, or as preventing a fraud upon the consumer, or as ensuring him a more wholesome comestible, or as serving the interests of the public in general as regards economy or opportunity at pleasure for enjoyment. On the other hand, there is a serious infringement of the rights of the manufacturer.

The arguments may be taken up in order:

1. The term *ice cream* does not call for *cream of milk*. The whole history of the term, as above traced, shows this to be a flagrant error.

2. The use of custard as a base produces a special type of ice cream running back to an early period in its history and including in its varieties some of the richest and most delicious ice creams. The use of whites and yolks of eggs for specific purposes in other creams is not unwholesome, and perpetrates no fraud upon the consumer—not to speak of their frequent use in domestic practice.

3. The use of cream of milk alone may render ice cream more rich in fat, but not therefore more wholesome, or affording greater benefit if it affect the quantity that may be safely eaten. Moreover ice cream is not generally eaten for nutritiousness. And if nutritiousness is to be considered, why bar ice creams in which eggs are used, as in the whole class of Neapolitan or French ice creams, or ice creams in which the solids of milk that afford more nutriment than the fat of milk predominate?

4. The argument that enforced use of cream of milk will prevent use of less costly substitutes by the manufacturer is directly met by the fact that at present many ice creams not made of cream of milk alone are for good reasons costly to make and to buy. But more important than this, the argument raises the economic question. Use of cream of milk alone would at once establish a minimum manufacturing cost much higher than it is at present, whereas now a wide range of perfectly wholesome and palatable mixtures is possible with a corresponding range of prices. Continuous fraud upon purchasers is no more probable at present than with any other article of merchandise—whereas to enforce use of cream of milk only would,

by limiting variety and by raising the minimum price, restrict the customer's opportunity for enjoyment. It would be as inequitable and economically as unwise as to enact that clothing should consist of wool only and not of mixed wool and cotton or of cotton.

Such answers the definition provides to the type of argument commonly urged, proving such arguments to be only superficially cogent.

The definition, however, does more than this. It fully supports the manufacturer's contention that the enactment of a standard for ice cream is an infringement by inequitable legislation of his rights.

1. The origin, subsequent history, and present use of the term *ice cream* show that it has always covered a wide range of mixtures, the term *cream* meaning a mixture when it was used in the compound and the range of mixtures being the same today, as regards use of cream of milk, milk, and eggs, as when the confection originated.

2. The fixing of an arbitrary standard is not to debar the use of prejudicial or unwholesome mixtures. The mixtures debarred are perfectly wholesome. The arbitrary standard aims to confer upon the consumer a benefit that is wholly illusory, since by limiting variety and by raising the minimum price, it limits his opportunity for enjoyment. Under the definition, the manufacturer claims the right to offer a wide range of wholesome ice creams.

3. The definition shows that trade practice and domestic practice run parallel as regards use of basic ingredients in the mixtures used. It is inequitable to lay restrictions upon the manufacturer which are counter to general practice and understanding in the making and use of the confection.

Upon the facts as stated in the definition and the merits of the case, it is contended that the fixing of an arbitrary standard upon the constitution of the mixtures used in making ice cream, as regards the proportions of cream of milk used, the use or disuse of eggs, or other limitation upon the nature of those mixtures in contradiction of historic practice, both domestic and trade, is inadvisable in view of the interests of the consumer and inequitable as regards the rights of the manufacturer.

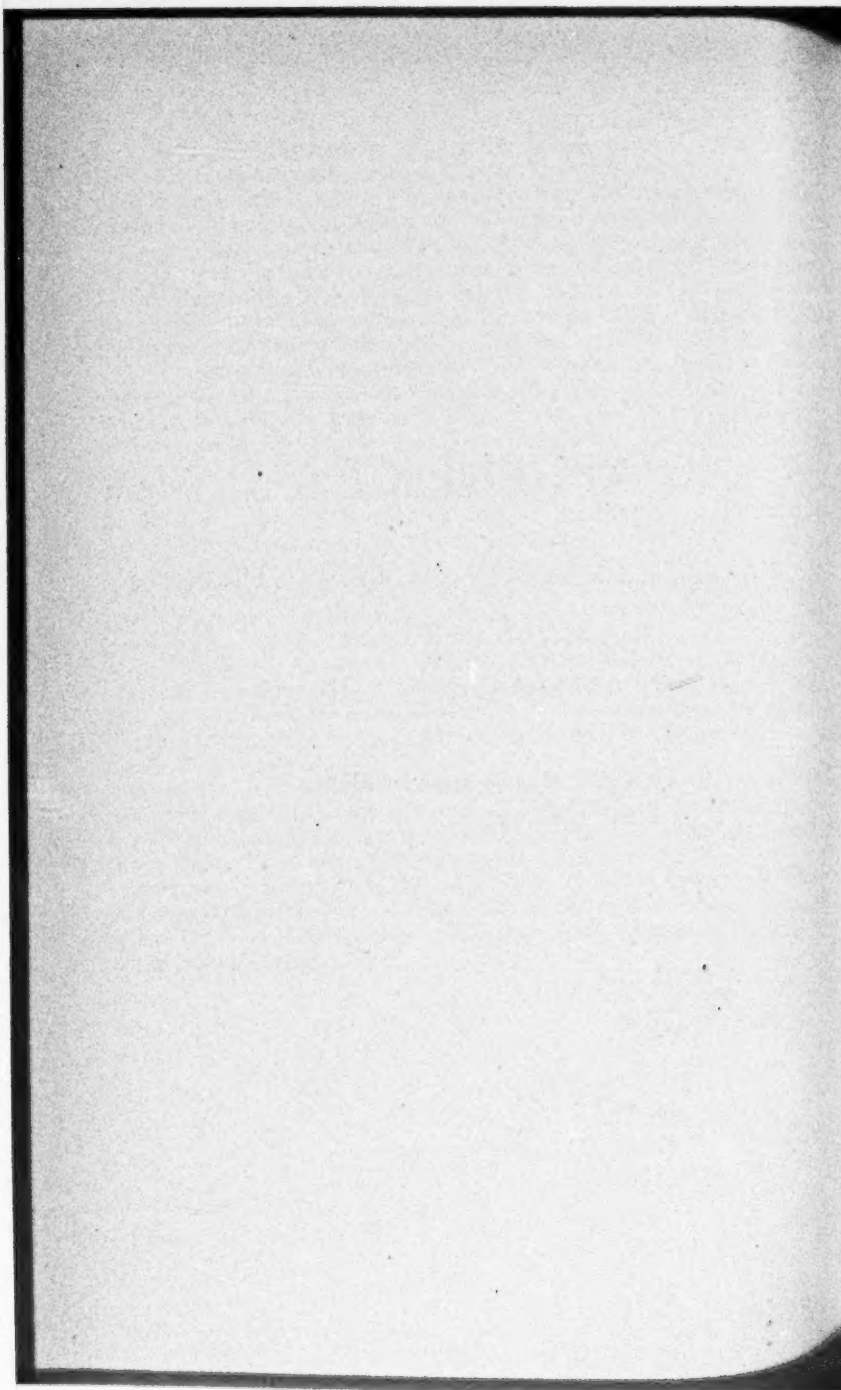
# APPENDICES

Containing Selected Citations Illustrating the History  
of the Words

## CREAM AND ICE CREAM.

- I. CREAM in the Sense of "Mixture."
- II. ICE CREAM.







I.

CREAM IN THE SENSE OF "MIXTURE."

(39)



## I. CREAM IN THE SENSE OF "MIXTURE."

### A. DEFINITIONS FROM DICTIONARIES.

(The dictionaries quoted are the *New English Dictionary* of the English Philological Society, the supreme historical authority, which has been in process of preparation and publication over fifty years, with the cooperation of readers and scholars all over the world, and the three standard American dictionaries which have issued editions of recent date.)

#### (1893) *New English Dictionary* (Part C), Oxford.

(*Cream*) 2. *transf. a.* A fancy dish or sweet of which cream is an ingredient, or which has the appearance and consistency of cream, as almond, chocolate, iced cream, etc.—

b. A substance or liquor of cream-like consistency; *esp.* a decoction (of barley, etc.): cf. CREMOR. *Obs.*

c. The part of a liquid which gathers on the top like the cream on milk; a 'head' of scum, froth, etc.—

d. A cream-like preparation used cosmetically. See also COLD CREAM.

#### 1913. *Century Dictionary and Encyclopedia*.

(*Cream*) 5. A sweetmeat or dish prepared from cream, or of such consistency as to resemble cream: as, an iced cream, or ice-cream; a chocolate cream.

#### 1913. Funk and Wagnalls, *Standard Dictionary*, New York.

(*Cream*) A delicacy for the table resembling cream or made in part of it; as ice-cream, whipped cream; also, a bonbon containing a cream-like substance.

#### 1913. *Webster's International Dictionary*.

(*Cream*) 2. Hence, - - - [Def. 1. defines cream of milk] A fancy dish or confection prepared from cream, etc., or so as to resemble cream, as a kind of filling for cake made with cream, or corn-starch, eggs, etc.

## B. QUOTATIONS.

The following quotations are submitted in proof of the early and wide-spread use of *cream* to denote a mixed sweet dish that may or may not contain cream of milk, or even milk, and often contains eggs, etc. This use began long before the practice of freezing such creams (the earliest quotation in English—a mixture not containing cream of milk dates in the 15th century), and comes down to our own day. The present use is proved by quotation from a typical American cook-book, but all American and English cook-books are included by general reference.

It is also shown that the creams were chilled or iced before serving before the practice of freezing came in. Also, that the same creams used before this practice came in were eaten frozen or unfrozen, proving that *cream* in *ice cream* has the sense of mixture (see also quotations for *ice cream* under II).

It will be noted that the term *cream* included mixtures now termed *custards*, a recent development of the term *custard*.

A number of foreign references from French, Spanish, German, Dutch, are first given to show the general Continental use of *cream* in the sense of mixture, followed by the English references.

## 1. QUOTATIONS FROM CONTINENTAL LANGUAGES.

1676. *L'Escole parfaite des  
Officiers de la Bouche.*

Paris.

p. 210.

## CREME BLANCHE.

Boil together a pint of good milk, a good-sized piece of sugar and the whites of two eggs well beaten, and a little orange-flower water. Stir it well until it begins to thicken, then let it cool and put it through a fine strainer.

1676. *L'Escole parfaite des  
Officiers de la Bouche.*

Paris.

p. 210.

## CREME DE LAIT D'AMANDES.

Shell and bray in a mortar a pound of sweet almonds, moistening them with fresh milk; when they are macerated pour over them a pint of milk and mix well; heat almost to the boiling point; strain through a cloth, pressing thoroughly, and take the milk produced, with a good-sized piece of sugar, and boil it until it begins to thicken. Add a little orange-flavor water and serve the Cream cold.

1683. *Le Cuisinier François.*

Rouen.

p. 111.

## CRÈME DE PISTACHES.

Take a handful of pounded pistache nuts and a quart of milk and boil them. When they are nearly done, mix 6 egg yolks with your pistache nuts and a little fresh butter: put the whole into a saucepan with a quantity of sugar and a little salt. If you wish add musk or amber, but very little musk: beat it well, and serve.

1737. *De Geoevende en Ervaren Keuken-Meester.*

[The Practical &amp; Experienced Cook.]

Amsterdam.

p. 145.

## 22. Room van Pistasjes.

## [PISTACHE CREAM.]

Put a handful of peeled Pistache nuts in  $\frac{1}{2}$  pint of Milk, let them boil together with a little flour stirred in, when it is nearly done add in the yolks of 6 Eggs with some of the nuts and a little fresh butter. Put it all in a dish with a good deal of Sugar and a little (If you wish add Musk or Ambergris to the sugar, but very little Musk); mix it well together, . . . and serve. . . .

1740. *Le Nouveau Cuisinier Royal et Bourgeois.*

M. [François] Massialot.

Paris.

v. 1, p. 276.

## CRÈME D'AMANDES.

After having shelled the almonds pass them through bolting-sieve with a little water to make almond milk. A great many almonds are necessary. Make a cream whether of pistache nuts, chocolate, or any other flavor, with only a little flour, sugar and rose-flower water, without eggs or milk, but a little salt and much butter. Cook it with the almond milk until it is the proper consistency.

1742. *Le Cuisinier Moderne.*

Vincent La Chappelle.

The Hague.

vol. 3, p. 264.

## CRÈME DU VIN DE RHIN.

Put into a saucepan about a bottle of Rhine wine, add a stick of cinnamon, the rind of a lemon, and a piece of sugar: when it boils add about 12 yolks of eggs well beaten, and a glass of water. Stir it until the Cream thickens, strain through a cloth into the dish in which you serve it cold.

1742. *Le Cuisinier Moderne.*

Vincent La Chappelle.

The Hague.

vol. 3, p. 267.

## CRÈME À L'ITALIENNE.

## CRÈME BRULÉE.

## CRÈME BLANCHE LÉGÈRE.

All made with milk, eggs and flavoring, cooked in a double boiler, and served cold. The Crème Brulée has caramel added, and the Crème blanche has only the whites of the eggs.

1747. *Arte de Roposteria.*

Juan de La Mata.

Madrid.

p. 138.

## NATA A LA INGLESA.

[cream]

Pound thoroughly in a stone mortar, 2 egg yolks, 3 ounces of sugar, 2 ounces of candied lemon and orange peel, and 5 ounces of pistache nuts well cleaned. When all these are well blended, mix with them a quart of milk and cook them, stirring constantly. After cooking add 5 or 6 drops of orange flower water, and putting it in a dish, cook it again until it is of a golden brown color.

[This recipe is identical with the one given in *Le Confiturier*, 1791.]



1747. *Arte de Reposteria.*

Juan de La Mata.

Madrid.

p. 139.

NATA A LA PORTUGUESA.  
[cream]

Mix with a pint of milk half a pint of good cream, the yolks of eggs, powdered sugar to taste, a small piece of cinnamon, and the amount of candied lemon and orange peel cut in small pieces. It boil, stirring constantly, until it appears ready to adhere to the sides of the kettle or saucepan.

1759. *Le Manuel des Offices de Bouche.*

Paris.

p. 352.

## ENTREMETS DE CRESMES.

Anglaise.

Cream boiled with sugar, cinnamon, coriander & lemon, mixed with a little flour and 6 yolks of eggs put through a bolting cloth and cooked in a bain-marie.

Café.

Cream, tea and sugar, a little flour, 6 yolks.

Espagnole.

Same with coffee.

au.

Cream, sugar and white of eggs.

With wine and eggs.

Like "l'Anglaise" except made with water instead of cream.

Reine.

Do. do. except with whites of eggs, instead of yolks.

chevre-feuille.

Like the one "à l'eau" except the addition of half a pound of pounded almonds.

e.

The beaten whites of 6 eggs.

guignotte.

Like "l'Anglaise" with pounded macaroons added after cooking and some marmalade.

oise.

Cream, sugar, vanilla, 8 egg yolks.

chocolat.

Cream, sugar, chocolate and egg yolks.

e.

Cream cooked with spices, mixed with caramel & 6 egg yolks.

Various other forms with rice, etc.

1772. *Dictionnaire Portatif de Cuisine, etc.*

Paris.

p. 62.

CHOCOLAT (CRÈME DE)  
In a Bain-marie.

1 oz. of grated chocolate mixed with the yolks of 4 eggs and a little milk, add to it 1 pt. of cream, and half a pt. of milk. Sugar to taste; have some boiling water in a casserole, set the dish containing your cream in it, and cover with another dish, and do not remove it until the cream is thickened.

1772. *Dictionnaire Portatif de Cuisine, etc.*

Paris.

p. 199.

CRÈME LÉGÈRE.

Boil for  $\frac{1}{4}$  of an hour a pt. of milk and  $\frac{1}{8}$  of a pound of sugar. Stir in the whites of 2 eggs well beaten, and let it boil once or twice more beating all the while. Let it cool and serve, sprinkling with orange-flower water and powdering with sugar.

1772. *De Volmaakte Hollandische Keuken-Meid.*

Written by a Well-known Lady of The Hague.

Amsterdam.

part 6, p. 55.

[LEMON CREAM.]

Take the juice of 4 lemons,  $\frac{3}{4}$  of a pound of loaf sugar mixed with the whites of 4 eggs, stir it until it thickens, then take it from the fire and put in a few drops of orange-flower water, . . .

1772. *De Volmaakte Hollandische Keuken-Meid.*

Written by a Well-known Lady of The Hague.

Amsterdam.

part 6, p. 59.

CRÈME BRULÉE.  
[Caramel Cream.]

Half a pint of sweet cream, 3 eggs in some sugar, place it on the fire; when it thickens, take a red hot shovel and color it.

1775. *Les Dons de Comus, ou L'Art de la Cuisine.*

Paris.

vol. 3, p. 191.

CRACKLING CREAM.  
*Crème en Croquet.*

Boil 1 pint of milk with a little sugar. Beat up the yolks of 6 eggs on a plate. Mix with your milk, and set the dish on the stove. Stir constantly until the cream thickens all through. Set the dish on a tripod to cook slowly. When it is done pass a red hot shovel over it to dry it. Then cut it in bits with a knife, and set it in the oven to dry out so that it will be crisp, like a spice cake. While cooking it sprinkle on a grating of lemon rind.

[This same recipe is given in a number of English books about the same period.]

1775. *Les Dons de Comus, ou L'Art de la Cuisine.*

Paris.

vol. 3, p. 187.

## BLACK CREAM.

Boil a pint of milk with sugar. Take a piece of charcoal the size of an egg and break it up in a goblet with a little of the milk, until the latter is quite black. Break into a dish the yolks of 8 eggs. Mix your cream and enough of the black milk to give sufficient color. Strain through a doubled napkin, and cook in a double boiler. For 6 bitter almonds may be added. Serve cold. It may be covered with the white of egg whipped and iced.

1777. *Allerneuestes Kochbuch.*

Mr. Jean Neubauer.

Vienna.

p. 405.

#### AN ORANGE CREAM.

Take 6 Oranges, rub three of them on some sugar into a dish, pour over the juice of the six, beat up 8 egg yolks and one whole egg and add with a small piece of sugar and a little white wine, strain it through a hair sieve, set it over boiling hot water till it thickens.

1777. *Allerneuestes Kochbuch.*

Mr. Jean Neubauer.

Vienna.

p. 404.

#### EINE CREM ROJALE.

Put some bitter and sweet almond paste and some almond biscuits into a dish with sweet Cream, rub a Lemon on some sugar, a little cinnamon, a small piece of sugar, some egg yolks and one whole egg, when it is all well mixed strain through a hair sieve, set it over a moderate fire, cook until it begins to thicken, let it cool and serve.

1791. *Le Confiteur.*

Paris.

p. 273.

#### CRÈME VELOUTÉE.

1 pt. of sweet cream and the same quantity of milk, 4 oz. of sugar, boil together, and when it is reduced one-half take it off the fire; then dissolve some rennet about the size of a pea in 2 or 3 spoonfuls of milk with 5 or 6 drops of orange-flower water. Mix all together, put it over hot coals covering with a plate, on which place a few coals to keep it warm, which causes it to thicken. Serve cold.

1791. *Le Confiteur.*

Paris.

p. 275.

## CRÈME VIERGE.

1 pt. of good milk and half a pt. of cream, 3 or 4 oz. of sugar, 4 bitter almond cakes; boil them together gently, and when reduced about  $\frac{1}{4}$  put in the whites of 2 eggs well beaten and 5 or 6 drops of orange-flower water, or the zest of a lemon. Stir constantly over a slow fire until it begins to thicken; serve cold.

1791. *Le Confiteur.*

Paris.

p. 278.

## PORTUGUESE CREAM.

Take a pt. of milk and half the quantity of cream, the yolks of 3 eggs with some sugar, a piece of cinnamon and the same amount of lemon peel cut small. Cook till it thickens to a cream, stirring all the time. Serve cold.

1791. *Le Confiteur.*

Paris.

p. 280.

## LEMON CREAM.

The juice of 6 lemons with some of the zest mixed in a glassful of water with the whites of 6 fresh eggs, all well mixed and strained several times through a cloth; cook over hot coals, without allowing it to boil, when thick take it off and serve it cold.

1791. *Le Confiteur.*

Paris.

CRÈME CROQUANTE.  
(Crackling Cream.)

Mix gradually the yolks of 4 eggs with a pint of milk; add the grated rind of a lemon and sugar to taste; stir over a moderate fire until it is thick. Reduce the fire a little and take up the cream in spoonfuls putting it around the edge of a dish, taking care not to

burn it, but seeing that it sticks to the dish. Color it with a brown shovel; then detach the cream with a knife and pile it up on the same dish; set it in the oven to crisp.

1791. *Le Confiturier.*

Paris.

p. 275-6.

CRÈME VIERGE, another way.

3 half-pints of good cream boil over a slow fire with 3 or 4 oz. of sugar until it is reduced about  $\frac{1}{4}$ . When nearly cold, add rennet the size of a pea, 5 or 6 drops of orange-flower water, mix thoroughly and let it set.

1791. *Le Confiturier.*

Paris.

p. 277.

CHOCOLATE CREAM.

$\frac{1}{2}$  pt. of cream to a pint of milk, the yolks of 2 eggs and 3 oz. of sugar; mix and boil until reduced about  $\frac{1}{4}$ , stirring constantly; then add enough grated chocolate to give it taste and color; let it boil up again 5 or 6 times, and let it cool before serving.

1791. *Le Confiturier.*

Paris.

p. 277.

CRÈME DE PISTACHES.

Heat 2 or 3 ounces of good Pistache nuts, shell them and bruise them in a mortar with a little lemon peel. Take a quart of good milk, two egg yolks and 4 ounces of sugar, beat them all together and add the pistache nuts, boil the whole over a moderate fire, taking care to stir it well until the Cream is cooked, but not too thick. Put it on a china dish to serve cold.



1791. *Le Confiturier.*

Paris.

p. 278.

## CRÈME À L'ANGLAISE.

Take 2 yolks of eggs, 4 ounces of sugar, 2 ounces of lemon peel and orange peel candied, and 5 ounces of peeled pistache nuts; pound them well together and dilute with a quart of milk; cook over a slow fire stirring constantly. When it is done add 5 or 6 drops of orange-flower water, put it on a dish that can be placed on the fire until the edges are crisp, then sugar it well and color it golden brown with a red hot shovel.

1791. *Le Confiturier.*

Paris.

p. 279.

## CRÈME GLACÉE.

After having made a Cream [in the usual way with a quart of milk and half the amount of cream, the yolks of two or three eggs, flavoring, etc.] when it is ready to serve, glacé it with icing made of powdered sugar, the white of an egg, and a few drops of orange-flower water. Spread it over the Cream and dry it out with a hot stove-lid.

1791. *Le Confiturier.*

Paris.

p. 283.

## CRÈME À L'EAU.

Beat up 4 fresh eggs whole, with a quart of water, the rind of a lemon cut very fine, also the juice, and 4 ounces of sugar: pass it through a napkin 2 or 3 times, cook it on a dish over a very slow fire stirring it until it makes a thick cream—take it off while hot but serve it cold.

## 2. QUOTATIONS FROM WORKS IN ENGLISH.

c. 1430. *Two Fifteenth Century Cookery Books from the Harleian Mss.*

[Edited by Thos. Austin, London, 1888.]

p. 21.

## CREM DE COLOURE.

Take an make thicke Milke of Almaundys, and do it in a pottle, and sette it ouer the fyre: then take a fayre Canvas, an put it ther-on and late renne out the Water; then take the halfyndele, and put it in a pot of erbe; then take the other halfyndele and parte it [in] to and make the half below and do ther-yn Wyn, Sugre, Clowes, Mace powder of Canelle, take [blank in Ms.] and grynd a lytel in a mortar; than temper it vppe wyth almaunde mylke, and do euery of hem in a pottle an loke that it be y-like chargeaunt and sette it ouer the fyre, an boyle it a lytyl, an serue forth.

c. 1430. *Two Fifteenth Century Cookery Books from the Harleian Mss.*

[Edited by Thos. Austin, London, 1888.]

p. 33.

## CREME BASTARDE.

Take the whyte of Eyroun a grete hepe, and putte it on a pann full of Mylke, and let it boyle; then sesyn it so with Salt an honey a lytel, then lat hit kele, and draw it thorw a straynoure, an take fayr Cowe mylke an draw yt with-all and seson it with Sugre, and loke that it be poynant and doucet: and serue it forth for a potage of for a gode Bakyn mete, wheder that thou wolt.

c. 1430. *Two Fifteenth Century Cookery Books from the Harleian Mss.*

[Edited by Thos. Austin, London, 1888.]

p. 91.

## FRIED CREME DE ALMONDES.

Take almondes and blanche hem, and wassh hem in faire water and bray hem small in a mortar with faire water: And then take

hem and the water togedre som-what thik, and drawe hem through a streynour into a faire potte, And set hem ouer the fire, and lete hem boyle ones; And then take hem downe, and cast thereto Salte, and lete stande a forlonge wey or ij And cast a litull vinegre therto: And then cast hit on a faire lynnyn cloth that is faire wassh and the water y-wronge oute there-of; and cast hit all abroad with the ladull and lete men hold the cloth al abroad; and then take a ladill and draw vndur the cloth and draw away the water all that a man may. And then gadur all the creme togidur in the clothe; And then take the cloth with the creme, and hange hit vppon a pyn, and lete the water droppe out two or thre houres or more; And then take hit of the cloth, and putte hit in a bolt of tre, And caste Sugar ynogh thereto and a litul salt, And if hit wex to thik, take swete wyne and temper hit with ale; And then take reysons of coraunce clene y-wassh and put hem there-in, that they be not seyn; And whan hit is dressed in maner of mortrewes take rede anneys in confite or elles leues of Burage, and set thereon in a dissh.

1649. *The English House-Wife.*

G. M[arkham.]

5th ed. London.

p. 111.

[No heading.]

Take a pint of the sweetest and thickest creame that can be gotten, and set it on the fire in a very cleane scowred skillet, and put into it Sugar, Cynamon, and a Nutmeg cut into four quarters, and so boyle it well: then take the yelks of four Eggs, and take of the slimes, and beat them well with a little sweet Creame: then take the four quarters of the Nutmegge out of the Cream, then put in the egges, and stir it exceedingly, till it be thick: then take a fine Manchet [loaf of bread], and cut it into thin shives, as much as will cover a dish bottome, and holding it in your hand, powr half the Cream into the dish: then lay your bread over it, and cover the bread with the rest of the creame, and so let it stand till it be cold: then strew it over with Canaway Confets, and pricke up some Cinamon Confets and some slic't blates; or for want thereof, scrape all over it some Sugar and trim the sides of the dish with sugar.

1660. *The Accomplisht Cook, or The Art & Mystery of Cookery.*

Robert May.

London.

ALMOND CREAM.

Take  $\frac{1}{2}$  lb. of Almonds paste beaten with rose-water and strain it with a qt. of cream; put it in a skillet with a stick of cinnamon and boil it, stirring constantly; when it is boiled thick, put sugar to it and serve it up cold.

1660. *The Accomplisht Cook, or The Art & Mystery of Cookery.*

Robert May.

London.

ALMOND CREAM otherwayes.

Take thick almond milk made with fair spring water and boil it a little, put to it a little salt and vinegar, cast it into a clean strainer and hang it upon a pin over a dish- . . . add to it beaten sugar and a little sack, muskedine or white wine.

1660. *The Accomplisht Cook, or The Art & Mystery of Cookery.*

Robert May.

London.

ALMOND CREAM otherwayes.

Take a qt. of cream, boil it over night, then in the morning have  $\frac{1}{2}$  lb. of almonds blanched and fine beaten, strain them with the cream and put to it  $\frac{1}{4}$  lb. of double refined sugar, a little rose-water, a little fine ginger and cinnamon finely searced, mix together. dish it with fine carved sippets round about it.

1660. *The Accomplisht Cook, or The Art and Mystery of Cookery.*

Robert May.

London.

SNOW CREAM.

1 quart of cream, the whites of 6 eggs, a quartern of rose-water,  $\frac{1}{4}$  pound of double refined sugar beaten together. Have a fine silver dish with a penny manchets the bottom and upper crust being

taken away and made fast with paste to the bottom of the dish and a streight sprig of rosemary set in the middle of it, beat the cream and eggs together and as it froatheth take it off with a spoon and lay it on the bread and rosemary.

To make SNOW CREAM otherwayes with Almonds.

Take 1 quart of good sweet cream, and  $\frac{1}{4}$  pound of almond paste fine beaten with rose-water and stirred in  $\frac{1}{2}$  pint of white wine, put some orange-peel to it, and slic't nutmeg and 3 sprigs of rosemary, let it stand 2 or 3 hours in steep; then put some double refined sugar to it and strain it into a bason, beat it till it froath, and as the froath riseth take it off with a spoon.

1688. *London Gazette*, No. 2383/2 (N. E. D.)

All such Fruits, Iced Creams, and such other Varieties as the Season afforded.

1690. *Young Cooks Monitor*.

By M. H.

London.

p. 27.

To make LEMMON CREAM.

Take 6 Lemmons and pare them very thin and steep the paring in a quart of fair water that it may be very strong of the Lemmon-peel, then squeeze in the Juyce of the Lemmon; then add to it 3 spoonfuls of Orange-Flower water and the whites of 8 Eggs and 2 Yelks beaten very well then strain it Under a hair Sieve and sweeten to your Pallett with fine Loaf-Sugar and set it on a fire keeping it stirred all one way till it be a thick Cream.

ORANGE CREAM.

do. do.

ALMOND CREAM.

[ $\frac{1}{2}$  pound Jordan almonds, 1 qt. Cream.]

C. 1700. Author of the Journey to London, *The Art of Cookery*. In *Imitation of Horace's Art of Poetry*, p. 89.

Tis the Desert that graces all the Feast  
For an ill end disparages the rest:  
A thousand things well done, and one forgot,  
Defaces Obligation by that Blot.  
Make your transparent Sweet-meats truly Nice,  
With *Indian* Sugar and *Arabian* Spice:  
And let your various Creams incircled be  
With swelling Fruit just ravish'd from the Tree.

1709. *The Queen's Royal Cookery.*

By T. Hall, Free Cook of London.

London.

p. 173.

## LEMON CREAM.

Take 1 pint of Barley-Water and 6 Eggs, leaving out half their Whites; beat and mix them well together, then squeeze in the juice of 3 Lemons, and the Peel of one pared very thin and cut into small pieces; sweeten to your Taste, and set it over a slow Fire. Keep stirring all the While, and when it is as thick as Cream strain it, and let it cool.

1709. *The Queen's Royal Cookery.*

By T. Hall, Free Cook of London.

London.

## ALMOND CREAM.

Take  $\frac{1}{2}$  a pound of Jordan Almonds and blanch them, beat them in a mortar with 4 spoonfuls of Rose or Orange-flower water; then take 1 quart of Cream and put to the Almonds and stir them well together; strain through a Hair sieve and set it on a slow Fire and let it just boil. Take it off and sweeten it and put it out in little China dishes, and when cold serve it to the Table.

1709. *The Queen's Royal Cookery.*

By T. Hall, Free Cook of London.

London.

## SACK CREAM.

Whilst 3 pts of cream is boiling on the Fire, beat the yolks of 8 or 9 eggs with some Sack, and put in your Skillet keeping it stirring till it come to a curd, then run it through a strainer and save your curd being severed from your whey, season it with Cinnamon, Ginger, Nutmeg, Sugar and Rosewater.



1723. *The Cook's and Confectioner's Dictionary.*

Revised & Recommended by John Nott, Cook to His Grace, the Duke of Bolton.

[Recipe.] 209.

London.

## CREAM.

Take yolks of 4 or 5 Eggs beat them well in a Stew-pan with a little Flour, pouring on Milk by degrees to the quantity of a Quart; then put in a small Stick of Cinnamon some candy'd and some green Lemon-peel cut small. Set the Cream on the Furnace; stir it continually that it do not stick to the Bottom. When it is boil'd, set a Dish upon the Furnace and pour the Cream into it and let it boil again till it sticks to the side of the Dish, then set it aside and sugar it well on the top, heat the Fire-shovel red hot and brown the Cream with it to give it a fine golden Colour.

1723. *The Cook's and Confectioner's Dictionary.*

Revised & Recommended by John Nott, Cook to His Grace, the Duke of Bolton.

[Recipe.] 216.

London.

## ITALIAN CREAM.

Take 2 quarts of milk, boil it with sugar, a little salt and a stick of cinnamon; when it is boiling, take a large dish and a sieve into which put the yolks of 10 new laid eggs; strain both eggs and milk through it 3 or 4 times; then put the dish into a baking cover, pour all into it, and put fire over and under till your Cream becomes very thick.

1723. *The Cook's and Confectioner's Dictionary.*

Revised and Recommended by John Nott, Cook to His Grace, the Duke of Bolton.

[Recipe.] 217.

London.

## LEMON CREAM.

Pare 3 fair smooth lemons and squeeze out the juice, cover it close for 2 or 3 hours; when it tastes of the peel put to it the yolks of 2 eggs and the whites of 4. Beat this well with 2 spoonfuls of orange-

flower water, then put a pint of fair water to all these, strain and sweeten, set it over a gentle fire, stirring it constantly till it is as thick as cream.

1723. *The Cook's and Confectioner's Dictionary.*

Revised and Recommended by John Nott, Cook to His Grace, the Duke of Bolton.

London.

[Recipe.] 218.

MAIDEN CREAM.

Take the Whites of 10 Eggs, whip them to a Froth; put them in a Sauce pan with Milk, Orange Flower-water and Sugar. Set a Plate over a Stow put in a little Cinnamon, beat up your Cream very well and pour it into the Plate. Then brown it with a red hot Shovel and serve it.

1724. *Collection of Above 300 Recipes.*

London.

part I, p. 59.

ORANGE CREAM.

Take 4 oranges and grate the Peel into a Pt. of water, then squeeze the Juice into the water; beat the Yolks of 4 Eggs very well and put it in the water; sweeten it very well with double refin'd Sugar; press all hard through a strong Strainer, set it on the Fire, and stir it carefully all one way 'till 'tis as thick as Cream.

1724. *Collection of Above 300 Recipes.*

London.

part I, p. 59.

ALMOND CREAM.

Take half a pound of good Almonds, blanch and beat them very fine, with Orange-flower water; take a Qt. of Cream boil'd cool'd and sweeten'd, put the Almonds into it, and when they are mixed strain it through a Canvas, then stir it over the Fire, 'till it thickens and pour it into Glasses; if you love it richly Perfum'd, put in a Grain of Ambergreese.

1724. *Collection of Above 300 Recipes.*

London.

part I, p. 61.

## POSTATIA-CREAM.

Take an Ounce of the Kernels of Postatia-Nut, beat them small with 2 spoonfuls of Orange-flower water, and 4 Yolks of Eggs; boil a Qt. of Cream, and mix all together. When the Cream is so cool it will not curdle the Eggs, thicken it over the Fire with great care, . . .

1724. *Collection of Above 300 Recipes.*

London.

part II, p. 28.

## WHITE LEMON CREAM.

Take almost a Pint of Water, and the Whites of nine Eggs very well beaten, and the Juice of four large Lemons or five if they be not large; then strain it through a Jelly Bag and put to it half a Pound of double-refin'd Sugar beat and sifted; set it on a soft Fire and keep it constantly stirring all one way, till it is as thick as Jelly; pour it out quick.

1724. *Collection of Above 300 Recipes.*

London.

part II, p. 29.

LEMON CREAM, *the Best Way.*

Take 3 smooth fair Lemons, pare them, and squeeze out the juice; cut the Peel in small Pieces, and put it to the Juice; for 2 or 3 hours cover it close; and when it tastes of the Peel add to it the Whites of 4 Eggs and the Yolks of 2, beat this well with 2 spoonfuls of Orange-flower water, then put all these to a pt. of fair water, and sweeten it with double-refin'd Sugar; set it over a gentle Fire and stir it carefully 'till 'tis as thick as Cream.

1724. *Collection of Above 300 Recipes.*

London.

part II, p. 29.

## CREAM FLUMMERY.

Take a pt. of cream, 3 spoonfuls of Rice Flower, very fine ground or beat, and sifted till it is small, 3 oz. of sugar, and 2 oz. of Almonds beat small; beat them with some spoonfuls of milk for fear of oiling the whites of 3 eggs beat; strain the cream and eggs to the almonds and set it on the fire, and stir it all one way, till it is thick and smooth as a custard; then pour it into deep Glasses that when 'tis cold it may turn out in picked Shapes.

1725. *Court Cookery.*

London.

p. 194.

## MAIDS CREAM.

Take the Whites of 5 Eggs, whisk them to a Froth, and put them in a Saucepan with refin'd Sugar, Milk and Orange Flower Water set your Plate on a Stove with a little Cinnamon, and pour your Cream when it's well beat into the Plate. When it is enough [done] brown it with a red hot Shovel or Iron.

1730. *The Complete Practical Cook.*

Charles Carter.

London.

p. 185.

## FOR LEMON CREAM.

Take the Lemon Peel of 2 or 3 Lemons and bruise it and steep it all Night in Cream or Milk: Boil it in the Morning and turn it with the Juice of Lemon; put in a little Orange flower water and a little Sack and sweeten it with fine Sugar and a Musk Confit or two. You may colour some of this as Jellies, and this may be iced likewise.

1739. *The House-keepers' Pocket-Book and Compleat Family Cook.*

Mrs. Sarah Harrison.

London.

p. 158.

## LEMON CREAM.

Take the juice of 4 large Lemons and  $\frac{1}{2}$  pint of Water and a Pound of double refin'd Sugar beat fine, and the Whites of 7 Eggs and the Yolk of  $1\frac{1}{2}$  beat well; strain and set it over a gentle fire, skim and stir it all the While and when it is very hot, but not boiling, pour it into your Glasses.

[2 other recipes, one calling for 1 quart of Cream.]

1739. *House-keeper's Pocket-Book, etc.*

Sarah Harrison.

London.

p. 173.

## SNOW CREAM.

Take a pt. of the thickest cream and sweeten to your taste; take the whites of eggs and beat to a Froth; then take a Sprig of Rosemary and beat it in as the Snow rises, take it off & lay it in the Dish.

1753. *The Compleat Housewife.*

E. Smith.

London.

p. 185.

## LEMON CREAM.

Take 5 large lemons and squeeze out the juice, and the whites of 8 eggs well beaten, 10 oz. double-refin'd sugar beaten fine, 20 spoonfuls of spring water; mix and strain through a jelly bag, set it over a gentle fire, skim well; when it is as hot as you can bear your finger in it take off and pour in glasses.

1753. *The Compleat Housewife.*

E. Smith.

London.

p. 185.

## ORANGE CREAM.

Take a pint of the juice of Seville oranges, put to it the yolks of 6 eggs, the whites of 4, and strain; add 1 lb. of sugar; set on the fire and put the peel of  $\frac{1}{2}$  orange into it, keep stirring and when almost ready to boil take out the orange peel, and pour it in glasses.

1765. *The Art of Cookery, Made Plain & Easy.*

By a Lady.

London.

p. 284.

## RATAFIA CREAM.

Take 6 large laurel leaves, boil them in a Quart of thick cream; when it is boiled throw away the leaves; beat the yolks of 5 eggs with a little cold cream and sugar to taste, then thicken the cream with your eggs, set it over the fire again, but don't let it boil.

1765. *The Art of Cookery, Made Plain & Easy.*

By a Lady.

London.

p. 284.

## A FINE CREAM.

Take a Pt. of cream, sweeten it to your taste, grate a little nutmeg, put in a spoonful of orange-flower water, and rose water, and 2 spoonfuls of sack, beat up 4 eggs, but only 2 whites; stir all together over the fire till it is thick.



1765. *The Art of Cookery, Made Plain & Easy.*

By a Lady.

London.

p. 283.

#### ALMOND CREAM.

Take a Qt. of cream, boil it with half a nutmeg grated, a blade or two of mace, a bit of lemon-peel, and sweeten it to your taste; then blanch  $\frac{1}{2}$  lb. of Almonds, beat them very fine with a spoonful of orange-flower or rose-water, take the whites of 9 eggs well beaten and strain them to your almonds, beat them together, rub through a coarse hair-sieve; mix with your cream, set it on the fire, and stir till it boils.

1765. *The Art of Cookery, Made Plain & Easy.*

By a Lady.

London.

p. 283.

#### BLANCHED CREAM.

Take a Qt. of the thickest, sweetest cream, season it with fine sugar & orange-flower water and boil it; then beat the whites of 20 eggs with a little cold cream, take out the treddles which you must do by straining it after it is beat, and while the cream is on the fire and boils, pour in your eggs, stirring it all the time one way till it comes to a thick curd, then take it up and pass through a hair-sieve, then beat it very well till cold.

1765. *The Art of Cookery, Made Plain & Easy.*

By a Lady.

London.

p. 281.

#### LEMON CREAM.

Juice and rinds of 3-4 Lemons, add the whites of 6 Eggs, beat well together, sweeten and cook over a gentle fire till thick.

## ORANGE CREAM.

Made with the yolks of 6 eggs, and the whites of 4.

## GOOSEBERRY CREAM.

1 Quart of gooseberry pulp, 6 eggs well-beaten, and a little butter cooked all together.

1773. *The Experienced English Housekeeper.*

Elizabeth Raffald.

London.

p. 232.

## PISTACHO CREAM.

Take  $\frac{1}{2}$  lb. of pistacho nuts, take out the kernels, beat them in mortar with a spoonful of brandy, put them in a tossing pan with pt. of cream and the yolks of 2 eggs beat fine, stir it gently over slow fire till it grows thick, then put it in a soup plate, when cold stick it all over with small pieces [of nuts].

1773. *The Experienced English Housekeeper.*

Elizabeth Raffald.

London.

p. 236.

## KING WILLIAM'S CREAM.

Beat the whites of 3 eggs very well, then squeeze out the juice of 2 large or 3 small lemons, take 2 ounces more than the weight of the juice of double refined sugar and mix it together with 2 or 3 drops of orange flower water and 5 or 6 spoonfuls of fair spring water when all the sugar is melted, put in the whites of the eggs into pan and the juice and set it over a slow fire, and keep stirring till you find it thicken, then strain it through a coarse cloth quick into the dish.

1790. *English Housewifery.*

Elizabeth Moxon.

Leeds.

p. 116.

## CHOCOLATE CREAM.

Take 4 oz. of chocolate more or less, grate it and boil it in a pint of cream, mill it well with a chocolate stick; take the yolks of 2 eggs and beat well, leaving out the strain, put to them 3 or 4 spoonfuls of cream, mix and set on the fire and stir until it thickens, but do not let it boil. Sweeten to taste and keep stirring till it be cold.

1790. *A Collection of Ordinances & Regulations for the Government of the Royal Household, etc., etc., also Receipts in Ancient Cookery.*

London.

[The recipes are of much earlier date than the publication, but the exact period is not specified.]

p. 463.

## CREME BOYLE.

Take creme of cowe mylke, and zolkes of eyren beten, and saffron and medel alle togedur, and boyle hit that hit be stonding, and dresse hit up stondynge of leches in dishes and plant hit with floures of borage and serve hit forth.

1790. *A Collection of Ordinances & Regulations for the Government of the Royal Household, etc., etc., also Receipts in Ancient Cookery.*

London.

p. 447.

## CREM OF ALMONDE MYLK.

Take almonde mylk and boyle hit, and when hit is boylt take hit from the fyre and springe thereon a lytel vynegur; then take and cast hit on a clothe, and cast theron sugar, and when hit is colde gedur hit together, and leche hit in dyshes and serve hit forth.

1793. *The French Family Cook.*

Translated from the French.

London.

p. 244.

## ITALIAN CREAM.

Put 3 gills of milk into a stew-pan, and boil it, then add the peel of a lemon, some coriander seed, a bit of cinnamon, a little more than half a quartern of sugar, two or three grains of salt, and let it boil till half consumed; let it cool, and have ready in another stew-pan a little flour beat up with the yolks of 6 eggs; stir in your cream by little and little; strain through a sieve, and set in a dish in hot water over the fire till the cream be set. Color with a salamander.

[Number of recipes in this book, all using a little flour, and some rennet to make the cream set.]

1795. *Practice of Cookery, Pastry, &c., &c.*

Mrs. Frazer.

2d Ed.

Edinburgh.

## ALMOND CREAM.

Boil a choppin [qt.] of cream with cinnamon and lemon-peel, blanch and beat  $\frac{1}{2}$  lb. of sweet almonds with a little sugar; cast the whites of 6 eggs; mix them with the almonds and strain them through a sieve. Mix in the boiled cream gradually amongst them, and put on the fire stirring it all one way—sweeten to your taste and take out the cinnamon and lemon-peel.

1800. *Cookery & Pastry.*

Mrs. Maciver.

Edinburgh.

p. 114.

## SWEET ALMOND CREAM.

Boil a chopin of cream with cinnamon and lemon-peel; blanch and beat  $\frac{1}{2}$  lb. of sweet almonds; wet them with a little rose-water as

you beat them; beat the whites of 8 eggs very well, mix them with the almonds and thrust them through a searce, mix in the boiled cream gradually amongst them and put them on the fire, stirring all one way; do not let it boil; sweeten to your taste, taking out the ticks of cinnamon and the lemon-peel.

1800. *Cookery & Pastry.*

Mrs. Maciver.

Edinburgh.

p. 114.

#### CLEAR LEMON CREAM.

Pare 4 large lemons very thin; lay the parings into half a mutch-in of water; squeeze the juice of the lemons into it, and let it stand one minute; strain it off and boil it up with a pound of double refined sugar and a gill of rosewater; take the whites of 9 eggs—you must not whip them too much, else they will frothe; strain the whites though a searce, and mix them with the liquor by degrees for fear of curdling; put it on a very clear fire, let it be scalding hot and put it in glasses.

#### ORANGE CREAM.

Made the same way.

#### RATAFIA CREAM.

Laurel leaves boiled in cream, strained out and the cream mixed with egg yolks and sugar.

1900. *Boston Cook Book.*

Mary J. Lincoln.

The ingredients of the various creams in this typical cook book are given to illustrate the present use of the term *cream* in its old general use:

Page 360. Andermatt Cream.  $\frac{1}{2}$  cup rice, 3 cups boiling milk, cup preserved fruits, 1 pint thick cream. Serve with sponge cake.  
 Page 355. Plain Bavarian Cream.  $\frac{1}{4}$  box gelatine, water, 1 pint cream, 1 dozen lady-fingers, sugar, vanilla, wine, boiling water.  
 Page 357. Norfolk Cream. 1 pound candied plums, plain Bavarian cream, one third of which is colored with cochineal, half cup of cherries.

Page 377. Orange Cream for Cake. Rind of half, juice of one, orange, lemon juice, water, corn-starch, yolk of one egg, butter.

Page 377. Orange and Cocoanut Cream for Cake. One egg, one cup of whipped cream, sugar, cocoanut, orange.

Page 378. Cocoanut and Raisin Cream. One cup of raisins, half a cup almonds, half a cup of grated cocoanut, white of one egg beaten stiff.

Page 535. Coffee Cream. One pint milk, sugar, salt, coffee, junket tablet. Eat with sugar and cream.

Page 389. Cream for Cream Cakes and Eclairs. One pint milk, corn-starch, three eggs, sugar, salt or butter.

Page 375. Cream for Cream Pies. One pint milk, two eggs, sugar, salt, butter, flour, flavoring.

Page 346. Spanish Cream. Gelatine, eggs, sugar, salt, milk, white of three eggs, vanilla.

Page 346. Italian Cream. Same ingredients, differently mixed.

Page 534. Prune Cream. Prune juice, sugar, gelatine, water, one pint cream.

Page 345. Tapioca Cream. Tapioca, one pint milk, yolks of two eggs, sugar, salt, whites of two eggs, vanilla.

Page 349. Velvet Cream. Gelatine, sherry, lemon, sugar, one and a half pints of cream.

And so forth. All cook books contain recipes for creams covering a wide variety of mixtures, with and without cream of milk or milk, of the same character as in the 17th and earlier centuries.



II.  
ICE CREAM.

(69)

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## II. ICE CREAM.

## A. DEFINITIONS FROM DICTIONARIES.

The same dictionaries are used as in the case of *cream* above. Correction of the definitions in certain details will be found in the (see 3.22), namely that the New English Dictionary, (cf. also Century Dictionary) in saying "Earlier term, *iced cream*" is not at all implied that *iced cream* necessarily preceded *ice cream*, that this dictionary should have noted the 18th century British of *ice cream* to include all ices in cook-book use; also, that the American dictionaries should have noted the universal American of ice cream to cover all ices as a general class. All the dictionaries attest the fact of the wide range of mixtures included under *ice cream*—mixtures made of cream of milk, milk that we now call *custard*.

(1893) *New English Dictionary, Oxford.*

*Ice*) 5. a. A frozen confection. Now with *an* and *pl.*  
In French the *pl. glaces* in this sense was admitted by the Acad. 1762; but as late as 1825 it was asserted to be incorrect to say *glace*.  
*Ice-cream*. A compound of flavoured and sweetened cream or custard, congealed by being stirred or revolved in a vessel surrounded by a freezing mixture. (Earlier term, *iced cream*.)

1913. *Century Dictionary and Encyclopedia.*

*Ice*) 3. A frozen confection consisting (a) of sweetened and flavored cream, milk, or custard (cream-ice, ice-cream), or (b) of the sweetened juice of various fruits (water-ice).  
*Ice-cream* (Strictly *iced cream*) A confection made by congel- variously flavored cream or custard in a vessel surrounded with freezing-mixture.

1913. Funk and Wagnall, *Standard Dictionary*, New York.

*Ice*) 2. A frozen dessert, as ice-cream or water ice.  
*Neapolitan ice*, ice-cream composed of several layers of various flavors.  
*Ice-cream*: Cream, milk, or custard, sweetened and flavored, and frozen by a freezing-mixture, being usually agitated by a dasher in process, to make it of uniform consistency.  
*Neapolitan ice-cream*, same as *Neapolitan Ice*. See under *Ice*.

1913. *Webster's International Dictionary.*

(Ice) 2. A mixture of water, cream, custard, etc., sweetened, flavored, and artificially frozen.

(Ice-cream) Sweetened cream or custard flavored, as with fruit, chocolate, wine, etc., and beaten and frozen in a can which is rotated in a freezing mixture, usually of ice and salt.

## B. QUOTATIONS.

Quotations illustrating Continental practice, from which English practice was derived and which has continuously affected it, are given first, and then the English citations.

Attention is directed to the fact that the creams or mixtures used are of the same kind as before the practice of freezing came in; that the creams might be eaten frozen or unfrozen; and in particular to the clear evidence of the wide variety of mixtures used.

A few quotations from recent American cook-books are included to show the use of custard ice creams, and more particularly to attest the existence of the main class of creams made with custard, often called typically "Neapolitan ice cream." The whole range of American cook-books is, however, included by general reference in support of the application of the term *ice cream* in domestic and general practice to a wide range of mixtures with varied proportions of cream of milk, milk, eggs, etc.

1. FOREIGN QUOTATIONS ILLUSTRATING THE MEANING OF THE TERM  
*Ice Cream.*

1737. Pierre-Jacques Ribon *L'Ecole Parfaite Des Officiers De Bouche.*

Paris.

(Title of section) On the way to Freeze all sorts of Delicious "Waters" (eaux délicieuses).

(The "waters" are fruit juice mixtures, and they are frozen in bottles packed in ice and salt. The use of the word "eau" is perhaps doubtful, in that it may mean "water" in a similar sense to our "rose-water," etc., or fruit-juice. The mixtures are similar in composition to our water ices.)

1742. *Le Cuisinier Moderne.*

Vincent La Chapelle.

The Hague.

p. 220.

## CRÈME DE PISTACHE À LA GLACE.

Take a suitable quantity of pistache nuts; put them in boiling water to remove the skins, and plunge them into fresh water; dry them in a napkin and pound them with a little sweet cream. Put into a saucepan 1 or 2 pints of cream, season with sugar, stick of cinnamon and the rind of a lemon: when this boils, add your pistache nuts and the yolks of 5 eggs well beaten. Put it back on the fire to cook the eggs, and when cooked add little by little the juice of spinach to color it. Strain through a cloth and put it in freezing moulds.

1742. *Le Cuisinier Moderne.*

Vincent La Chapelle.

The Hague.

p. 220.

## TOURTES À LA GLACE.

Freezing moulds of tin are needed, one or two feet in height and five or six inches round. For a Tourte à la glace take at least a pint of cream, put it in saucepan with a good-sized piece of sugar and the rind of a lemon; boil it, add 3 yolks of eggs to a pint, a stick of cinnamon as big as your finger and boil till they are well mixed. Put it through a sieve or bolting-cloth, and let it cool, then freeze it . . . . Take apricots cut in half peeled and powdered with sugar, put them into a freezing tin, and when your cream is frozen, serve it on a crust of almond paste and put your apricots on top.

1742. *Le Cuisinier Moderne.*

Vincent La Chapelle.

The Hague.

p. 221.

## CRÈME DE CHOCOLAT À L'ITALIENNE.

Put 3 or 4 goblets of water into a chocolate pot, with  $\frac{1}{2}$  or  $\frac{3}{4}$  of a pound of chocolate & a piece of sugar, and boil. Empty it into a saucepan and mix with it 1 or 2 yolks of eggs, cooking it a little with the eggs. Whip it up, and as the mousse forms put it in a sieve. Put the mousse into glasses, set them in moulds and freeze.

1742. *Le Cuisinier Moderne.*

Vincent La Chapelle.

The Hague.

p. 221.

## CRÈME AU CHOCOLAT.

Put into a saucepan a couple of pints of cream, some sugar, a stick of cinnamon, the rind of a lemon and half a pound of chocolate: bring it to a boil stirring well with a wooden spoon. Strain through a cloth, let it cool, and beat it well with an egg whip. As it becomes a mousse, take it up on a hair sieve and set on a plate to drain. Continue until you have enough to make *fromages à la glace* or to fill small moulds. You can make *fromages à la glace* without whipping the mixture.

1742. *Le Cuisinier Moderne.*

Vincent La Chapelle.

The Hague.

p. 222.

## TURK'S HEAD À LA CRÈME À LA GLACE FOUETTÉE.

Whip 8 or 10 pints of sweet cream, and as the mousse forms put it in a sieve. When you have as much as you need, add a moderate



amount of powdered sugar, mix it in with a skimmer, put it in a Turk's head mould and freeze it.

You can also use sour cream in place of sweet; it is as good in its way as the other.

1742. *Le Cuisinier Moderne.*

Vincent La Chapelle.

The Hague.

p. 234.

CRÊME DE CITRON.

Cook some lemons in water, mash them and put them into a saucepan with sugar, a bottle of Rhine wine or Champagne. Test the flavor, and let it cool. Add the yolks of 12 eggs, and strain through a cloth. Cook in a bain-marie. This cream may also be frozen. Oranges may be prepared in the same way, and with cream in place of wine.

1742. *Le Cuisinier Moderne.*

Vincent La Chapelle.

The Hague.

p. 234.

CRÊME D'ABRICOTS.

Cook the apricots in sugar and strain through a sieve. Add good Rhine wine or Champagne, let it cool and then add the yolks of eggs: for a small dish at least a dozen. [Used like the Lemon Cream either as a cooked custard or a frozen dessert.] Peaches and Plums may be treated the same way.

1747. *Arte de Roposteria.*

Jaun de La Mata.

Madrid.

p. 139.

ESPUMA DE LECHE.

Dissolve half a pound of sugar in a quarter of a gallon of good cow's milk with a little essence or a few pieces of cinnamon, leaving it to infuse awhile so that the cinnamon will impart its flavor to the

mixture. Then strain it through a napkin or sieve into a pan, adding to it half a pint of cream and beating it with a chocolate-stick until it froths, and continuing until there is enough for a dish.

This same froth may also be frozen in glasses made for the purpose so that they can be plunged in snow, in the same manner as Iced Beverages.

Many people make this Froth with sheep's milk in place of cow's milk, but it is necessary to cook this with eggs, about half a dozen to quarter of a gallon of milk, with some cream also if you wish, but that is not essential.

1759. Francois Toppens *La Cuisiniere Bourgeoise*, Brussels.

*Ice of all kinds.* In winter you serve winter syrups—and in summer you take waters for summer (eaux d'ete). Place these waters in ice-moulds, and, as they freeze, they should be stirred from time to time. When they are ready, serve them in goblets.

1759. *La Cuisiniere Bourgeoise*.

Brussels.

p. 449.

FROMAGE À LA GLACE.

Take a pint of double cream if you wish or any other kind that is good, half a pint of milk, the yolk of one egg, and three quarters of a pound of sugar; let them come to a boil 5 or 6 times and take it off the fire. Add some flavoring like orange-flower, bergamot, or lemon and put it in your mould and freeze it.

1768. *Le Cannameliste Français*.

Sieur Gilliers.

Nancy & Paris.

p. 150.

MOUSSE.

Take 2 pints of sweet cream, add to it 1 large cup of strong coffee or chocolate, and powdered sugar to your taste; mix well and strain into another dish. Whip the cream and as the mousse rises, take it up with a skimmer and put into a sieve to drain. Continue until you have enough for your glasses, fill them as full as possible and plunge in a pail of ice. This can be made of cream alone, letting some parings of lemon infuse in it, or flavoring with essences.

1768. *Le Cannameliste Français.*

Sieur Gilliers.

Nancy & Paris.

NEIGE [ICE CREAM.]

p. 152.

*Neige de crème ordinaire.*

Take 12 fresh eggs, separate the yolks and whites. Strain the yolks through a cloth, mix them with 2 pints of sweet cream; add a little lemon peel; cook over a slow fire stirring until it begins to rise; take it off and add powdered sugar to taste, and when it is dissolved pour the cream through a strainer into a dish. Let it cool and then freeze.

1768. *Le Cannameliste Français.*

Sieur Gilliers.

Nancy & Paris.

[PISTACHE ICE.]

p. 152.

*Neige de pistaches sans crème.*

When your pistache nuts have been shelled, pound them well with 1 or 2 slices of lime, adding a little water to prevent them from turning to oil; put them through a sieve with a spoon, mix with clarified sugar and a little water and freeze.

1768. *Le Cannameliste Français.*

Sieur Gilliers.

Nancy & Paris.

[LEMON ICE.]

p. 152.

*Neige de citrons.*

Take 12 fine lemons, dip in fresh water and dry at once. Have a piece of loaf sugar and grate 6 lemons on it, take off with a knife the part touched by the fruit, and put it in a pan with 1 pint of water, and squeeze in the juice of the lemons, adding clarified sugar to your taste; strain the whole through a cloth and put it in the freezer.

All fruit ices should have a couple of glasses of fine wine added to them.

1768. *Le Cannameliste Français.*

Sieur Gilliers.

Nancy &amp; Paris.

p. 153.

[ORANGE ICE.]

*Neige d'Orange.*

Take 12 oranges, grate the rinds as with the lemons, squeeze the juice and put into a bowl with a pint of water, and the grated rinds together with the sugar on which they were grated; add the juice of 4 lemons, sweeten to taste, and strain through a cloth, . . . freeze. When partly frozen add a glass of gooseberry syrup.

1768. *Le Cannameliste Français.*

Sieur Gilliers.

Nancy &amp; Paris.

p. 153.

[LIME ICE.]

*Neige de cedra.*

Take 7 or 8 limes; grate the rinds on sugar; cut them in quarters and boil them until they are soft; cover with cold water, dry and put through a sieve; take this marmalade and mix in the grated rinds and a pint of water, add the juice of 12 lemons, sweeten to taste with clarified sugar, strain and freeze.

1768. *Le Cannameliste Français.*

Sieur Gilliers.

Nancy &amp; Paris.

p. 154.

[ORANGE-PEAR ICE.]

*Neige de bergamotte.*

Take 4 orange-pears and grate on sugar, put the grating into a dish with 2 pints of water; squeeze in the juice of 12 lemons, sweeten to taste, strain and freeze.

1768. *Le Cannameliste Français.*

Sieur Gilliers.

Nancy &amp; Paris.

[APPLE ICE.]

p. 154.

*Neige de Pommes.*

Take 7 or 8 pippins or other apples, according to the shape of your moulds; peel and core them, and let them cook in a pint of water until they are soft; put them through a colander. Mix this marmalade with a little water, add the juice of 2 lemons and sweeten to taste, strain and freeze.

1768. *Le Cannameliste Français.*

Sieur Gilliers.

Nancy &amp; Paris.

[PEACH ICE.]

p. 155.

*Neige de Pêches.*

12 ripe peaches; take off skins and stone them, put them through a sieve, mix the marmalade with a pint of water, and squeeze in the juice of 3 lemons, add sugar, strain and freeze.

1768. *Le Cannameliste Français.*

Sieur Gilliers.

Nancy &amp; Paris.

RASPBERRY ICE.  
STRAWBERRY ICE.  
CHERRY ICE.

p. 156.

2 or 3 pounds of fruit mashed through a colander, mixed with water and sugar, then frozen. The raspberry and strawberry have 1 pint of gooseberry juice added. The cherry ice has the juice of 2 lemons.

## POMEGRANATE ICE.

8 pomegranates, seeded and mashed through a colander. Add to the juice a bottle of Burgundy and the juice of 4 oranges, . . .  
etc.

1768. *Le Cannameliste Français.*

Sieur Gilliers.

Nancy &amp; Paris.

p. 156.

[APRICOT ICE.]

*Neige d'Abricots.*

24 apricots; after making them into marmalade pound 5 or 6 of the apricot kernels and mix in with it. Add the juice of 4 lemons, and finish like the other ices.

PLUM ICE.

do. do.

1768. *Le Cannameliste Français.*

Sieur Gilliers.

Nancy &amp; Paris.

p. 156.

[PEAR ICE.]

*Neige de poires.*

Take any kind of pear; cut them in two, stew them and cover with cold water when taken from the fire; then pare and core them, and put through a colander. Add a pint of water and the juice of 4 lemons; sweeten, strain and freeze.

1768. *Le Cannameliste Français.*

Sieur Gilliers.

Nancy &amp; Paris.

p. 158.

FILBERT ICE  
or HAZEL-NUT ICE.

*Neige d'avelines de noix.*

1 pound of one or the other kind of nut; clean and dry them, crack and set them in a moderate oven to give them a pale brown color. When cold pound them well with a little cream; put the paste through the colander, mix it with a pint of cream, cook a little, sugar to taste, . . . etc.



1768. *Le Cannameliste Français.*

Sieur Gilliers.

Nancy &amp; Paris.

[ARTICHOKE ICE.]

p. 159.

*Neige d'artichauts.*

3 or 4 artichokes, using only the bottoms. Cook them soft, mash them with a quarter of a pound of pistache nuts, one-fourth of a candied orange and a little cream. Mix the paste with a pint of cream, sweeten and freeze.

1768. *Le Cannameliste Français.*

Sieur Gilliers.

Nancy &amp; Paris.

CHESTNUT ICE.

p. 159.

*Neige de marrons.*

Take off the outer shell of 24 chestnuts, bake them in the oven, put them into a napkin for a moment to get thoroughly heated; take off the inner skins, and pound them with a little cream. Mix the paste with a pint of cream and cook slightly, sweeten . . . and freeze.

1768. *Le Cannameliste Français.*

Sieur Gilliers.

Nancy &amp; Paris.

[SHERRY ICE.]

p. 160.

*Neige de vin d'Espagne.*

Have your freezing mould in ice, put into it 2 bottles of sherry wine, two glasses of water and 2 glasses of Champagne, with 2 cups of clarified sugar, mix and freeze.

1768. *Le Cannameliste Français.*

Sieur Gilliers.

Nancy &amp; Paris.

p. 161.

## BITTER ALMOND ICE.

## SAVOY BISCUIT ICE, ETC.

*Neige de biscuits d'amandes amères, de biscuits à la cuiller &c.*

Take one or the other of these cakes and dry them in the oven, pound them and put through the colander. Prepare a cream mousse without flavoring, put it in the freezer, and when partly frozen put in what you passed through the colander and mix lightly, place in moulds and return to the ice.

1772. *Dictionnaire portatif de Cuisine d'Office et de Distillation.*

Paris.

p. 175 &amp; p. 96 [new paging at letter M.]

## LEMON ICE &amp; ORANGE ICE IN SHAPES.

*Citrons (Glaces de).*

Take marmalade of lemons and freeze as other ices, put it in moulds shaped like lemons, wrapped in paper and replace in ice.

*Orange Glaces en Fruits.*

Take orange marmalade and freeze it, put into the moulds and replace in ice.

1772. *Dictionnaire portatif de Cuisine d'Office et de Distillation.*

Paris.

p. 127.

## [PEACH ICE, ETC.]

*Pêches (Cannelons de).*

Take ripe peaches, skin them and mix with a little water; strain through a colander pressing them well. Add 1½ pounds of sugar to a pint of juice, freeze, and put in moulds.

*Pêches (Glace de).*

Take very ripe peaches, skin them, mix with a little water, and let them infuse awhile; then strain through a colander pressing them well. Add a good deal of sugar and some of the pulp, and freeze.

1772. *Dictionnaire portatif de Cuisine d'Office et de Distillation.*

Paris.

[COFFEE CREAMS, ETC.]

p. 110.

*Café (Cannelons de).* Mix 6 cups of clear, strong coffee with 1 pint of cream and sugar, put it in a mould, and work it in a freezer, 1 pound of sugar in all.

*Café (Fromage de).* Put 6 ounces of coffee into a pint of water and boil and clear it as usual; boil 1 pint of cream, add 1 pound of sugar and your coffee; mix well and let it boil once or twice stirring all the time. Freeze.

*Café (Mousse de).* Make your coffee as for the Cannelons [*supra*]. Beat up the yolks of 6 eggs; add about 1 pint of cream and 1 pound of sugar; mix on the fire without boiling. When well mixed put it into goblets for the purpose, and put them in ice. If your mousse does not rise sufficiently add a little white of egg.

1772. *Dictionnaire portatif de Cuisine d'Office et de Distillation.*

Paris.

MOUSSE DE CAFÉ.

vol. 2, p. 38.

Make some clear, strong coffee; add the yolks of fresh eggs, some cream and sugar. Mix on the fire without boiling, and then whip it well. Finish as with other mousses.

1772. *Dictionnaire portatif de Cuisine d'Office et de Distillation.*

Paris.

MOUSSE À LA CRÈME.

vol. 2, p. 38.

Boil some cream with orange-flower water and sugar. When it is cold and well whipped, fill glasses or cups made for the purpose, and plunge in ice.

1772. *Dictionnaire portatif de Cuisine d'Office et de Distillation.*

Paris.

p. 6

[APRICOT ICE.]

*Abricots (Cannelons de).*

Take 20 ripe apricots; take out the kernels and crack them; mix the fruit with about 3 half pints of water, and let it steep for twelve hours, then strain it pressing well to get out all the juice. Add about 1 pound of sugar, and put the mixture into the freezer, and when it is frozen put it in moulds.

1772. *Dictionnaire portatif de Cuisine d'Office et de Distillation.*

Paris.

p. 162.

[CHOCOLATE ICE CREAM, ETC.]

*Chocolat (Cannelons de).*

Boil 5 cups of chocolate with 1 pint of cream, and when sufficiently cooked freeze in a mould.

p. 164.

*Chocolat (Fromage de).*

Mix 6 ounces of powdered chocolate with a little water, add the yolks of 5 eggs, 3 quarters of a pound of sugar, 1 pint of cream. Put on the fire but do not let it boil. Freeze and put into moulds.

*Chocolat (Glace de).*

Boil  $\frac{1}{2}$  pound of chocolate with 1 pint of cream, the yolks of 5 eggs and a great deal of sugar, and proceed as with the *cannelons de chocolat*.

*Chocolat (Mousse de).*

Mix some chocolate with a little water add some yolks of eggs and a good deal of sugar and some cream. Heat the mixture but do not allow it to boil. Let it cool, and whip it with an egg beater. If the mousse does not make readily, add the white of egg. Put it in glasses and bury in ice.

1772. *Dictionnaire portatif de Cuisine, d'Office et de Distillation.*

Paris.

[STRAWBERRY ICE, ETC.]

p. 274.

*Fraises (Cannelons de).*

Mash 1 quart of gooseberries with 3 quarts of strawberries, mix with water and a great deal of sugar, strain and freeze in *cannelon* moulds.

*Fraises (Fromage de).*

Mash about 1 pound of fine strawberries, mix them with 1 pint of cream and 1 pound of pulverized sugar. Let it stand an hour, strain and freeze in a mould.

1772. *Dictionnaire portatif de Cuisine, d'Office et de Distillation.*

Paris.

[RASPBERRY ICE.]

p. 276.

*Framboises (Cannelons de).*

Crush with the raspberries 1 quart of gooseberries. Mix them with water and a great deal of sugar; pass the mixture through a colander, and freeze.

1772. *Dictionnaire portatif de Cuisine, d'Office et de Distillation.*

Paris.

[ICE CREAM.]

p. 199.

*Crème (Glace de).*

Boil a few sweet almonds in 1 pint of cream for a minute or two; take them out, add a little orange-flower water and some conserve, put in  $\frac{1}{2}$  pound of sugar and the grated rind of one whole lemon, mix with the cream and let it stand a quarter of an hour. Strain and freeze.

*Crème glacée.*

To  $\frac{1}{2}$  pint of cream add about 1 quart of milk  $\frac{1}{2}$  pound of sugar,  $\frac{1}{2}$  teaspoonful of orange-flower water. Put it into a suitable dish and freeze.



1772. *Dictionnaire portatif de Cuisine, d'Office et de Distillation.*

Paris.

p. 357.

GREEN GRAPE ICE.

*Verjus (Canelons de)*

Squeeze out the juice from green grapes and strain through a cloth; mix with an equal quantity of water, add  $\frac{1}{2}$  pound of sugar to a pint of liquid, freeze in *canelons* moulds.

*Verjus (Glace de).*

Take grapes almost ripe, mash and press through a colander, add a great deal of sugar, strain and freeze.

1791. *Le Confiturier.*

Paris.

p. 288.

FROMAGE GLACÉ.

Take three quarts of milk and one quart of cream, put it on the fire with sufficient sugar and two lemon rinds cut in strips. Let it cook, stirring all the time until it begins to thicken, then turn it into a silver dish: when it is cool put it into the freezing mould, and place it in a bucket full of ice. "You can tell when it is frozen by trying it with your finger."

1794. *Wienerisches bewahrtes Kochbuch.*

By Ignaz Gartler.

Edited & Improved by Barbara Hikmann.

Vienna.

p. 464.

No. 1294. [FROZEN GREEN GRAPE JUICE.]

*Agras Gefrorenes.*

Take as many green grapes as you choose, squeeze out the juice till you have enough, add sugar to it and 4 lemons, with some water, and then freeze it.



1794. *Wienerisches bewahrtes Kochbuch.*

By Ignaz Gartler.

Edited &amp; Improved by Barbara Hikmann.

Vienna.

No. 1300.

[CHOCOLATE CREAM.]

p. 465.

*Chokoladengefrornes.*

Mix together the yolks of 4 eggs,  $\frac{1}{4}$  pound of powdered Chocolate and  $\frac{1}{8}$  pound of sugar, cook a pint of cream with  $\frac{1}{4}$  ounce of whole vanilla bean, mix the eggs with the cooked cream and put through a hair sieve. Freeze like other creams.

1794. *Wienerisches bewahrtes Kochbuch.*

By Ignaz Gartler.

Edited &amp; Improved by Barbara Hikmann.

Vienna.

No. 1304.

STRAWBERRY ICE.

p. 467.

*Erdbeergefrornes.*

Mash strawberries and extract all the juice, mix it with sugar, and freeze it. In the same way raspberries, mulberries, etc. may be frozen.

1794. *Wienerisches bewahrtes Kochbuch.*

By Ignaz Gartler.

Edited &amp; Improved by Barbara Hikmann.

Vienna.

No. 1306.

[VANILLA ICE.]

p. 467.

*Vanillegefrornes.*

Cook some vanilla in Cream and let it cool, add sugar to taste, and freeze.

1794. *Wienerisches bewahrtes Kochbuch.*

By Ignaz Gartler.

Edited and Improved by Barbara Hikmann.

Vienna

p. 470.

No. 1314.

[LEMON ICE.]

*Limonegefrornes.*

Rub 12 lemons on  $\frac{1}{4}$  pound of loaf sugar, and add to it the juice of them all, with two teacups of water, cook it and let cool, put it through a sieve and freeze.

1794. *Wienerisches bewahrtes Kochbuch.*

Ignaz Gartler.

Edited & Improved by Barbara Hikmann.

Vienna.

p. 472.

No. 1322.

[PEACH ICE.]

*Pfirsichgefrornes.*

Peel and mash through a colander good ripe peaches, and for a pound of pulp add  $\frac{1}{2}$  pound of sugar and 2 cups of Rhine wine, the grated rind of one lemon and the juice of three, mix with a cupful of boiling water and put it through a hair sieve, etc. . . .

1794. *Wienerisches bewahrtes Kochbuch.*

Ignaz Gartler.

Edited & Improved by Barbara Hikmann.

Vienna.

p. 473.

No. 1324.

[PISTACHE ICE.]

*Pistazengefrornes.*

Put a pint of cream in an earthen dish and boil it, take  $\frac{1}{2}$  pound of pistache nuts pounded fine, mix them with sugar, one whole egg,

and the whites of 5 eggs, pour in the hot cream, mix and stir until it begins to thicken, cool and freeze.

1794. *Wienerisches Bewahrtes Kochbuch.*

Ignaz Gartler, Edited & Improved by Barbara Hikmann.

Vienna.

p. 473.

No. 1325.

[ORANGE ICE.]

*Pomeranzengefrornes.*

Grate 6 oranges and 4 lemons on 1 pound of loaf sugar add 2 tea-cups of Maderia wine and one cup of boiling water to the sugar, and proceed as with other ices.

1794. *Wienerisches Bewahrtes Kochbuch.*

Ignaz Gartler, Edited & Improved by Barbara Hikmann.

Vienna.

p. 475.

No. 1331.

[CHERRY ICE.]

*Wechselgefrornes.*

Take Spanish or ordinary cherries remove the pits, let them stand over night to bring out the flavor [probably means in water, does not say so], then strain through a cloth sweeten to taste and freeze.

1794. *Wienerisches Bewahrtes Kochbuch.*

Ignaz Gartler, Edited & Improved by Barbara Hikmann.

Vienna.

p. 467.

[QUINCE ICE.]

Cook the quinces in water, let them drain and mash them; to 1 pound of this marmalade take  $\frac{3}{4}$  pound of sifted sugar, 2 wine glasses of Malaga wine, the yellow rind of a lemon and the juice of two, strain this once and freeze as other ices.

1794. *Wienerisches Bewahrtes Kochbuch.*

Ignaz Gartler, Edited &amp; Improved by Barbara Hikmann.

Vienna.

p. 472.

## [CREAM ICE.]

No. 1321.

(Literally "thick milk Ice".)

*Papinegefrornes.*

Boil 1 pint of cream and when it is cold, mix it with the yolks of 9 eggs well beaten, the rind of a lemon rubbed on sugar, a stick of whole Cinnamon, a quarter of a pound of sugar, cook all together till it begins to thicken, then put it through a hair sieve, and freeze. When half frozen a drop of oil of bergamot may be added.

1805. *Almanach des Gourmands.*

Paris.

Vol. 2, p. 227.

## DU FROMAGE, ETC.

This subject would be incomplete if we said nothing about *Fromages glacés*, although it is a mistake to give this name to all kinds of ices prepared in moulds. We speak of Strawberry *Fromage glacé*, or Apricot, or Gooseberry, although they contain not a drop of cream. That is one of the idiosyncrasies of our language.

Whatever they are made of these *Fromage glacés* in forms are the prettiest of desserts.

2. ENGLISH QUOTATIONS ILLUSTRATING THE MEANING OF THE TERM  
*Ice Cream.*1769. *The Experienced English Housekeeper.*

Elizabeth Raffald [1773].

London.

p. 233.

## TO MAKE ICE CREAM.

Pare, stone and scald twelve ripe apricots, beat them fine in a marble mortar, put to them 6 ounces of double refined sugar, a pint of scalding cream, work it through a hair sieve, put it into a tin that has a close cover, set it in a tub of ice broken small, and a large quantity of salt put amongst it. When the cream grows thick round the edges, stir it and set it in again till it grows quite thick. When your cream is all froze up take it out of your tin and put it in a mould . . . in another tub of ice and salt. . . .

1786. *The Complete Housekeeper and Professed Cook.*

Mary Smith.

Newcastle.

p. 299.

## ITALIAN ICE CREAM.

Boil 1 pint of cream with coriander seeds, a stick of cinnamon, a piece of lemon skin, for 10 minutes, sweeten with loaf sugar, strain, cool and freeze.

1786. *The Complete Housekeeper and Professed Cook.*

Mary Smith.

Newcastle.

p. 299.

## SHADDEROT CREAM.

Pare 2 lemons very thin and put into 1 pint of water, add the juice and let stand one hour. Strain and sweeten with clarified sugar, put to it a little essence of shadderot to give a fine flavor then put it in the ice-well. . . .

1786. *The Complete House-keeper & Professed Cook.*

Mary Smith.

Newcastle.

p. 299.

## BROWN BREAD ICE.

Take  $\frac{1}{2}$  pound of brown bread crumbs, put them into  $1\frac{1}{2}$  pints of good thick cream, sweeten to your taste with clarified sugar, put it into an ice-well, . . . &c. Biscuit ice may be made the same way.

1786. *The Complete House-keeper & Professed Cook.*

Mary Smith.

Newcastle.

p. 298.

## RASPBERRY ICE CREAM.

Mix  $\frac{1}{2}$  pound of raspberry jam in 1 pint of thick cream, add to it  $\frac{1}{2}$  teaspoonful of prepared cochineal to colour, strain it through a sieve to take out the seeds and put it in a tin or lead mould that will hold 2 quarts, which is generally called an ice-well, and put in a pail of broken ice, . . .

1786. Mary Smith, *The Complete Housekeeper*, New Edition, pp. 301 ff.

*Orange ice cream.* Squeeze the juice of three Seville oranges into a bowl with a pint of water, the rind of one orange, and as much sugar as will sweeten it; let it stand for two hours, strain it, put it into an ice-well, and freeze it; then put it into leaden orange moulds, lap them up in paper, put them into a pail with ice and salt under and over them, and let them stand two hours or more; dip them in water, turn them out upon a plate, and garnish them with green leaves.

*Peach ice cream.* Put half a pound of peach jam into a pint of water, add to it the juice of two lemons, mix it well, and strain it through a sieve; if it is not sweet enough add to it a little clarified sugar; put it into an ice-well, and freeze it pretty stiff; then put it into peach moulds, lap them up in paper, put them into a pail with ice and salt under and over them, and let them lie two hours to stiffen. When you want to use them, dip them in cold water, turn them out on a plate, colour them with a little prepared cochineal, and garnish them with green leaves.

*Ice cream of apricots.* Pare and stone fourteen apricots, put them into a preserving-pan with three-quarters of a pound of loaf-sugar, and a pint and half of water; set it over the stove to boil for twenty minutes; when they are boiling, bruise them with a spoon, take them out, and rub them through a hair sieve into a bowl:—when the apricots are cold, put to them one pint of cream, mix it well together, put it into the ice-well, and freeze it pretty stiff; then put it into apricot moulds, lap them in paper, and put them in a pail with some ice and salt under and over them; then let them lie two or three hours to freeze. When you want them, dip them in cold water, turn them out on plates, colour them with cochineal to look like apricots, and garnish them with green leaves.

*Ice cream another way:* Squeeze the juice of eight sweet oranges into a bowl, add to it half a pint of water, and as much sugar as will sweeten it; strain it through a sieve, put it into an ice-well, and freeze it till it is stiff; put it into a lead pine-apple mould, lap it well up in paper, put it into a pail of ice, and salt under and over it, and let it stand for three hours. When you want it, dip your pine-apple in cold water, turn it out on a plate, green the leaves of the pine-apple with spinach juice, and garnish it with green leaves. You may put this cream into melon and pear moulds. If a melon, you must green it with spinach juice;—if a pear mould, you must streak it with red.



1791. *The Practice of Cookery, Pastry, Pickling, Preserving, &c.*

Mrs. Frazer.

Edinburg & London.

p. 133.

ICE CREAMS.

Apricot Ice.

Pare and stone a dozen and a half of ripe apricots; cut them in small pieces and throw them in a sieve; squeeze them very well with a spoon and add three-quarters of a pound of clarified sugar: take the kernels out of the shells and pound them fine in a mortar, moistening them with water; then mix this with your apricots and if the mixture is too thick thin it with the juice of 2 or 3 lemons and a little more water; then put it in your jelling-pot, etc., etc. [directions about freezing]. You may do peaches the same way.

Strawberry Cream Ice.

Take a pound of preserved strawberries; squeeze them through a sieve; boil a chopin [pint] of cream with a piece of sugar; mix this among your strawberries and pass the whole through your searce again; then ice it as before. All preserved fruits may be done the same way.

p. 134.

Pine Apple Ice.

Take what number of them you may have occasion for and pare them; cut them small and beat them in a mortar; squeeze them through a cloth; pound and squeeze them till you have got the whole of them through; add to it the juice of 4 lemons, and clarified sugar boiled to a pearly height. If it is too thick add some water, and put the whole through a fine searce. Ice it as before.

1792. *The London Art of Cookery.*

John Farley.

London.

p. 337.

ICE CREAM.

Take 12 ripe apricots, pare stone and scald them, and beat them fine in a marble mortar. Put to them 6 ounces of double refined sugar, a pint of scalding cream, and work it through a hair sieve. Put it into a tin that has a close cover, and set it in a tub of ice broken small, and a large quantity of salt put among it. Etc.

1796. *The Art of Cookery.*

Mrs. [Hannah] Glasse.

London.

p. 323.

To Make ICE CREAM.

Pare and stone 12 apricots and scald them, beat them fine in a mortar, add to them 6 ounces of double refined sugar and a pint of scalding cream and work it through a sieve. [Directions for freezing follow.] You may do any sort of fruit the same way.

[Conjectural date 1818, in N. Y.  
Library, but probably earlier.]

1818? *New London Family Cook.*

Duncan Macdonald.

London.

p. 348.

BARBERRY ICE CREAM.

Put a spoonful of barberry jam into a basin with 1 pint of cream; squeeze in the juice of 1 lemon; add cochineal to color it; put it into a freezing-pot and cover it, and set in a pail of ice, . . .

Apricot, raspberry, strawberry and most other fruits may be iced in the same way.

BARBERRY WATER ICE.

Put a spoonful of barberry jam into a basin; squeeze in one lemon add a pint of water and a little cochineal to color it; pass it through a sieve and freeze it. Be careful that it freezes thick and smooth like butter before you put it in your moulds.

RASPBERRY AND STRAWBERRY WATER ICE.

The same way.

PINEAPPLE WATER ICE.

Take 2 gills of pineapple syrup, squeeze in the juice of 2 lemons and add a pint of water.

CHINA ORANGE WATER ICE.

Rasp 1 China orange, squeeze in the juice of 3, and 1 lemon, add 2 gills of syrup and  $\frac{1}{2}$  pint of water. Strain and freeze it thick and rich.

1900. *Boston Cook Book.*

Mary J. Lincoln.

p. 862 ff.

ICE-CREAM, No. 1 (Philadelphia Ice-Cream).

2 quarts cream; if thick, add 1 pint milk.

2 cups sugar.

2 tablespoonfuls vanilla.

This is the simplest, and to many the most delicious, form of ice-cream. Scald the cream; melt the sugar in it, and flavor when cool. Freeze as directed above. The cream should be very sweet and highly flavored, as both sweetness and flavor are lessened by freezing. To make it lighter and more delicate, whip the cream until you have a quart of froth, and add the froth after the cream is partly frozen. Many prefer to add the whites of eggs, beaten till foamy, but not stiff. Use two, three, or four eggs to each quart of cream. The proportion of sugar should vary according to the flavoring used.

#### ICE-CREAM, No. 2 (Neapolitan Ice-Cream).

- 1 quart milk.
- (6 or 8 eggs yolks.)
- 1 cup sugar.
- 1 pint to 1 quart cream.
- Sugar to taste.
- Flavoring.

Make a boiled custard with the milk, sugar, and the yolks of the eggs. Cook it slightly till smooth, but not curdled. Strain, and when cool add the cream, sugar to make it sweet, and any flavoring desired. The custard, when made with cream instead of milk, makes the richest kind of ice-cream. If cream cannot be obtained, beat the whites of the eggs till foamy, and add them just before freezing. No matter how many eggs are used, a little cream, if not more than half a cupful, is a decided improvement to all ice-creams. It is better to make sherbert, or fruit and water ices, than an inferior quality of ice-cream with milk.

#### ICE-CREAM, No. 3 (Miss Parloa).

- 1 pint milk.
- 1 cup sugar.
- 2 tablespoonfuls flour.
- 1 saltspoonful salt.
- 2 eggs.
- 1 pint to 1 quart cream.
- $\frac{1}{2}$  to 1 cup sugar.
- 1 tablesp. flavoring extract.

Boil the milk. Mix the sugar, flour and salt; add the whole eggs, and beat all together. Add the boiling milk, and when well mixed turn into the double boiler, and cook twenty minutes, stirring constantly till smooth; after that, occasionally. When cool, add the cream, flavoring, and sugar to make it quite sweet. This makes a smooth and delicious cream; and if the milk be boiling and the custard cook fully twenty minutes, there will be no taste of the flour.

[Mrs. Lincoln follows the above staple recipes with a number of variants based upon them, different in flavoring, additional ingredients such as nuts, cake or bread crumbs, etc., and in mode of serving.]

1910. *Manual for Army Cooks.*

Prepared under the Direction of the Commissary-General, U. S. Army.

U. S. War Department, Document No. 379, Office of the Commissary-General.

p. 117.

## [Recipe] 407. ICE CREAM (1 gallon).

Ingredients used:

2½ quarts water.

3 ounces flour.

1½ pounds sugar.

10 eggs.

¼ ounce extract.

2 12-ounce cans evaporated milk.

Boil 2 quarts of water and add a batter made of the flour and pint of water; then allow to come to a boil again, remove from the range, and add the sugar, eggs, a pinch of salt, flavoring extract, evaporated milk, and sufficient water to make 1 gallon. Whip well and allow to cool before putting in the freezer. One gallon is sufficient for 20 men.

## [Recipe] 408. ICE CREAM (chocolate).

Ingredients used:

3 ounces chocolate grated.

1½ quarts water.

3 ounces flour.

1½ pounds sugar.

2 12-ounce cans evaporated milk.

10 eggs.

Put the grated chocolate in two quarts of water on the range and let come to a boil; add a batter made of the flour and a pint of water; let come to a boil again and remove from the range. Add the eggs and sugar; whip well and add the milk, together with sufficient water to make 1 gallon; allow to cool before putting in the freezer. Sufficient for about 20 men.

## [Recipe] 409. ICE CREAM, Coffee (1 gallon).

Ingredients used:

6 ounces coffee.

1½ pounds sugar.

4 to 10 eggs.

2 12-ounce cans evaporated milk.

3 ounces flour.

Add the coffee to 1 quart of boiling water; then remove from the range, cover well, and allow to stand until cool. Place a quart of water on the range, make a batter, using the flour and 1 pint of water, adding the batter to the quart of water on the range when the latter has reached the boiling point. Let come to a boil, remove from the range, and strain the coffee into the mixture through a clean cloth. Add the eggs, sugar and cream. Whip well and add sufficient water to make 1 gallon. Freeze as ordinary ice cream. Sufficient for about 20 men.

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IN THE  
**Supreme Court of the United States**

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OCTOBER TERM, 1916.

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**No. 50**

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A. B. CROWL, *Plaintiff in Error,*

*vs.*

COMMONWEALTH OF PENNSYLVANIA,  
*Defendant in Error.*

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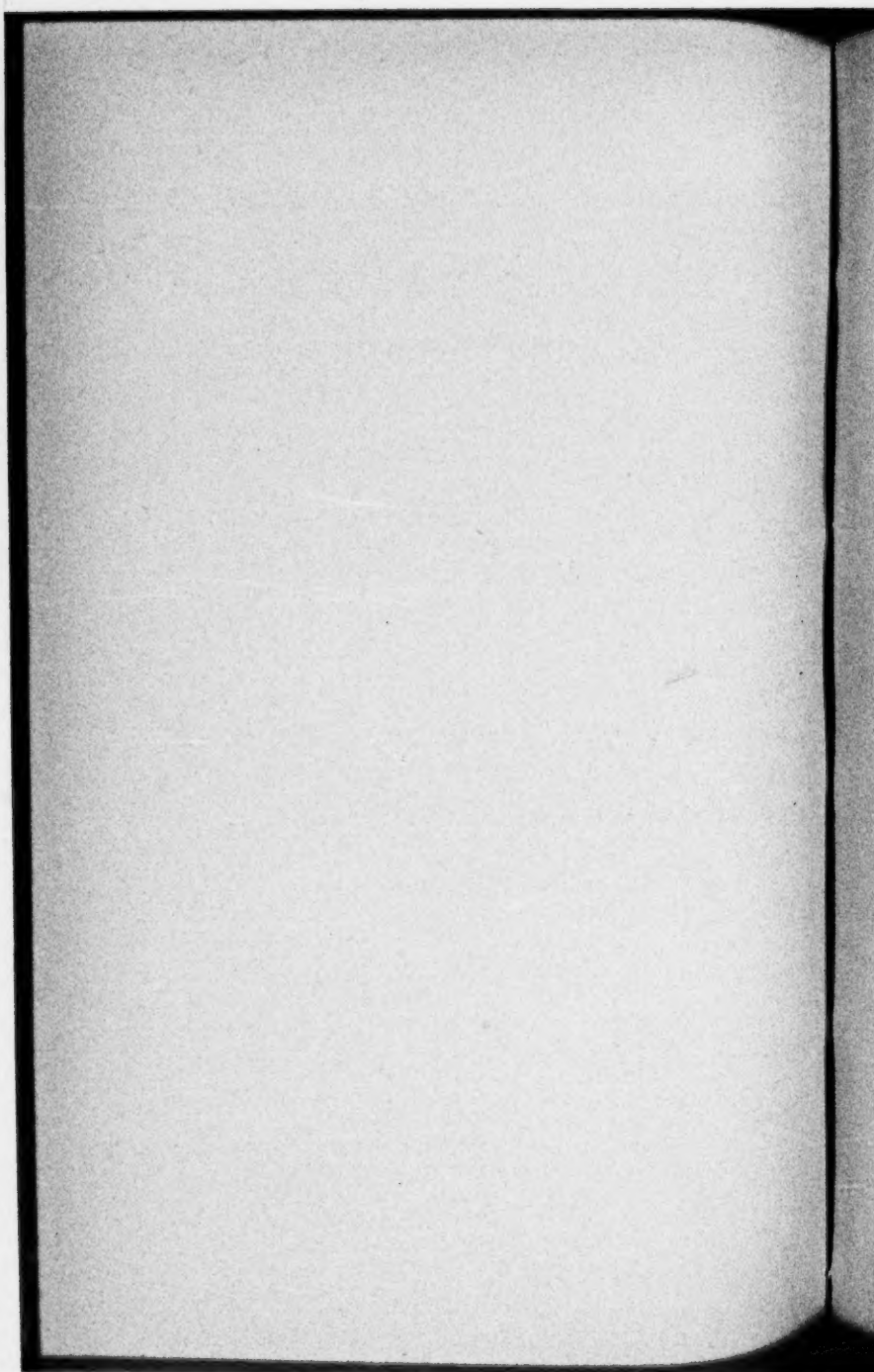
**Brief for Defendant in Error**

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WILLIAM M. HARGEST,  
Deputy Attorney General.

FRANCIS SHUNK BROWN,  
Attorney General.

*Attorneys for Defendant in Error.*





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IN THE  
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OCTOBER TERM, 1916.

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No. 50

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A. B. CROWL, *Plaintiff in Error*,

*vs.*

COMMONWEALTH OF PENNSYLVANIA,  
*Defendant in Error.*

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**Brief for Defendant in Error**

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**FACTS.**

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This case comes on a writ of error from the judgment of the Supreme Court of Pennsylvania (245 Pa. 554), which affirmed, per curiam, the Superior Court of Pennsylvania (52 Pa. Super. Ct. Rep. 539), sus-

taining a judgment of conviction of the Quarter Sessions of Erie County.

The Plaintiff in Error and W. F. Lewis, under the name of Crowl & Lewis, conducted a confectionery store in Corry, Erie County, Pennsylvania. (Record p. 22). They were indicted for selling "chocolate ice cream which then and there contained less than eight (8) per centum butter fat, and not then and there being flavored with fruit or nuts," contrary to the Act of Assembly of Pennsylvania approved March 24, 1909, (Pamphlet Laws 63).

The evidence showed that the ice cream which the Plaintiff in Error sold contained 2.7 per centum butter-fat or fats in total. (Record, page 28).

The jury, presumably upon the theory that the purchase was actually made from Crowl, acquitted Lewis and found the Plaintiff in Error guilty.

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## ACT OF ASSEMBLY.

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"An Act for the protection of the public health; and to prevent fraud and deception in the manufacture, sale, offering for sale, exposing for sale and having in possession with intent to sell of adulterated or deleterious ice cream; fixing a standard of butter fat for ice cream; providing penalties for the violation thereof, and providing for the enforcement thereof."

Section 1 provides "that no person \* \* \* shall sell \* \* \* ice cream adulterated within the meaning of this Act."



Section 2 defines the adulterations.

Section 3 permits "the use of fresh eggs and not exceeding one-half of one per centum of pure gelatin, gum tragacanth, or other vegetable gums."

Section 4 provides that

"No ice cream shall be sold within the State containing less than eight (8) per centum butter fat, except where fruit or nuts are used for the purpose of flavoring, when it shall not contain less than six (6) per centum butter fat."

Section 5 prohibits false labeling or branding.

Section 6:

"Any person, firm or corporate body who shall violate any of the provisions of this Act shall be guilty of a misdemeanor, and, upon conviction thereof, shall be sentenced to pay a fine of not less than twenty-five (25) dollars nor more than fifty (50) dollars."

Section 7:

"The Dairy and Food Commissioner shall be charged with the enforcement of the provisions of this Act."

Section 8 provides that the fines and penalties covered shall be paid to the Dairy and Food Commissioner and by him into the State Treasury.

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 ARGUMENT.
 

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## I.

ICE CREAM BEING SUSCEPTIBLE BOTH OF ADULTERATION AND FRAUD, IN ITS MANUFACTURE, A STATUTORY STANDARD IS JUSTIFIED.

*Muller vs. Oregon*, 208 U. S. 412; 52 L. Ed. 551.  
*State vs. Stone*, 46 La. Ann. 147; 15 So. Rep. 11.  
*Deems vs. Baltimore*, 80 Md. 164; 26 L. R. A. 541.

*Commonwealth vs. Wheeler*, 205 Mass. 384; 91 N. E. 415.

*Iowa vs. Schlenker*, 112 Iowa 642; 57 L. R. A. 347.

*State vs. Crescent Creamery Co*, 83 Minn. 284; 86 N. W. 107.

*Kansas City vs. Cook*, 38 Mo. App. 660.

*St. Louis vs. Grafeman Dairy Co.*, 190 Mo. 507; 89 S. W. 627.

*State vs. Campbell*, 64 N. H. 404.

*Blazier vs. Miller*, 10 Hun. 35.

*Commonwealth vs. Smyth*, 14 R. I. 100.

*Hutchinson Ice Cream Co. vs. Iowa*; argued herewith.

*Powell vs. Pennsylvania*, 127 U. S. 678; 32 L. Ed. 253.

## II.

THE ACT IS A VALID EXERCISE OF THE POLICE POWER.

22 Am. & Eng. Ency. of Law, 918-9 and notes.  
*State vs. Wagner*, 77 Minn. 483; 77 Am. St. Rep. 681; 46 L. R. A. 442.

*In re License Cases*, 5 Howard 504; 12 L. Ed. 356.

*Munn vs. Illinois*, 94 U. S. 113; 34 L. Ed. 77.

*Barbier vs. Connolly*, 113 U. S. 31; 38 L. Ed. 924.

*Lawton vs. Steele*, 152 U. S. 133; 38 L. Ed. 385.

*Powell vs. Pennsylvania*, 137 U. S. 678; 32 L. Ed. 253.

*Schollenberger vs. Pennsylvania*, 171 U. S. 1; 43 L. Ed. 1.

*Commonwealth vs. Burtsett*, 58 Pa. Super. Ct. 604.

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*People vs. Worden Grocery Co.*, 119 Mich. 601; 77 N. W. 315.

*People vs. Heinz Co.*, 90 App. Div. 409; 96 N. Y. N. Y. Supp. 141.

*People vs. Dehn*, 155 N. W. 744.

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*Commonwealth vs. Seiler*, 39 Pa. Super. Ct. 388.

*Commonwealth vs. Husley*, 136 Mass. 396; 15 L. R. A. 839.

*Plumley vs. Mass.*, 155 U. S. 461; 39 L. Ed. 391.

*Commonwealth vs. McCann*, 11 Pa. Super. Ct. 231.

*Crosman vs. Larson*, 191 U. S. 399; 49 L. Ed. 401.

*Schmidinger vs. Chicago*, 158 U. S. 376; 37 L. Ed. 364.

*Righers vs. Atlanta*, 66 S. E. Rep. 301.

## III.

THE ACT DOES NOT VIOLATE EITHER THE EQUAL PROTECTION  
OR THE DUE PROCESS CLAUSES OF THE FEDERAL  
CONSTITUTION.

*Mugler vs. Kansas*, 123 U. S. 623; 31 L. Ed. 205.  
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*Mathias Schmidinger vs. Chicago*, 226 U. S. 578;  
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*State vs. Addington*, 77 Mo. 110.

*Schollenberger vs. Pennsylvania*, 171 U. S. 1; 43  
L. Ed. 49.

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*Smith vs. St. Louis and Southwestern Rwy. Co.*,  
181 U. S. 242; 45 L. Ed. 847.

*Austin vs. Tenn.*, 179 U. S. 343; 45 L. Ed. 224.

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*Lieberman vs. VanDeCarr*, 199 U. S. 552; 50 L.  
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*Barbier vs. Connolly*, 113 U. S. 27; 28 L. Ed. 923.

*Connolly vs. Sewer Pipe Co.*, 184 U. S. 540; 46  
L. Ed. 691.

*Seabold vs. Northumberland Co.*, 187 Pa. 318.

*Wheeler vs. Philadelphia*, 77 Pa. 338.

*In re Sugar Notch Borough*, 192 Pa. 395.

*Powell vs. Pennsylvania*, 127 U. S. 678; 32 L.  
Ed. 253.

*Lawton vs. Steele, 152 U. S. 133; 38 L. Ed. 385.*

## I.

ICE CREAM BEING SUSCEPTIBLE BOTH OF ADULTERATION AND FRAUD, IN ITS MANUFACTURE, A STATUTORY STANDARD IS JUSTIFIED.

Ice cream has as its basis or chief ingredient either milk or cream, or both. Milk contains butter-fat or milk-fat (the terms are synonymous). Cream contains butter-fat. The thing which determines the richness of either milk or cream, is butter-fat.

Milk can be adulterated and therefore practically all of the states have found it necessary to fix the standard of butter-fat and solids which must be found in milk and cream.

In Pennsylvania the minimum standard of three and one-quarter ( $3\frac{1}{4}\%$ ) per centum butter fat and one-half ( $\frac{1}{2}\%$ ) per centum milk solids is fixed for milk, and eighteen (18%) per cent. butter fat for cream. (Act of June 8, 1911, Pamphlet Laws, 712.)

If milk and cream can be adulterated and fraud practiced upon the purchasers thereof, so as to require restrictive legislation, it is apparent that the adulteration of such a mixture or compound as ice cream is even easier and more easily concealed. It needs no argument to show that fraud can be practiced in the manufacture of ice cream.

*No profession, in recent years, has made such rapid strides or kept pace with the inventive progress of the times, as that of the manufacturing chemist. He is employed to use his skill and cunning to maneuver and*



*engineer the saving of dollars in the manufacture of food products.*

*His genius has succeeded in making chocolate candy without a trace of chocolate; of making all kinds of candy without sugar by the substitution of a drug condiment called saccharin; of making sausage without meat; and producing perfect fruit flavors by the use of ether compounds without a particle of fruit, AND ONLY RECENTLY IN CERTAIN STATES WHERE NO STANDARD OF BUTTER FAT HAS BEEN REQUIRED IN ICE CREAM, A PERFECT IMITATION OF ICE CREAM HAS BEEN MADE BY THE SUBSTITUTION OF COTTON SEED OIL, FOR THE CREAM FROM THE COW.*

Not long ago there was a much advertised dinner given by one of these ingenious gentlemen to his friends, at which every dish was prepared with epicurean elegance and palatable savor, and the host announced at the finish of the feast, that everything of which they had partaken was an imitation and nothing genuine.

It takes something more than a proper label to protect and safeguard the public against adulteration, fraud and deception.

The increase in the consumption of ice cream in this country, in the last twelve years, has been from fifty millions to one hundred and twenty millions of gallons. It has become a staple American food.

We are referred by the argument of the Plaintiff in Error to the definition of ice cream of Prof. Child, of the University of Pennsylvania. He says:

"Ice cream is a confection, or prepared food served as a delicacy, consisting of one of the various 'creams' or mixtures, as further defined below \* \* \* the basis of the 'cream' or mixture may



be a 'cream' (as now understood), or a 'custard' . . . . . A cream as the basis of the first type, may have, as its basic ingredient either *cream of milk* only, . . . or *cream of milk and milk*, or *cream of milk*, or *milk* and other ingredients—as condensed milk, eggs, etc., or milk and other ingredients."

But all of his definitions include cream or milk.

AND MILK DOES NOT MEAN "SKIMMED MILK." IT MEANS MILK AS IT COMES FROM THE COW.

There is no definition of ice cream from the lexicographers which excludes both milk and cream.

Ice cream must be made of milk either enriched as a custard, or of milk and cream, or of cream alone.

The term "ice cream" has a common and ordinary meaning, generally understood. The statute of Pennsylvania deals with it in that sense. It does not legislate concerning it with reference to any definitions either of chemists or exclusively of the trade.

In the case of *Muller vs. The State of Oregon*, 208 U. S. 412, 52 L. Ed. 551, Mr. Justice Brewer said, page 420; 555:

"When a question of fact is debated and debatable, and the extent to which a special constitutional limitation goes, is affected by the truth in respect to that fact, a wide-spread and long continued belief concerning it is worthy of consideration. We take judicial cognizance of all matters of general knowledge."

Adopting this language, it must be noted that the

legislatures of many states have believed that there is no constitutional limitation against the passage of laws fixing a standard for ice cream.

*Milk or cream being the basis of ice cream, and butter fat being the principal food value of milk or cream, of which the Court will take judicial knowledge under the authority just cited, it follows that the Legislature may require a standard of butter fat in ice cream just as they have provided a standard of butter fats in milk and cream.*

The standards for milk and cream have uniformly been sustained.

*State vs. Stone (1804), 46 La. Ann. 147, 15 So. Rep. 11.*

*Deems vs. Baltimore, 80 Md. 164; 26 L. R. A. 541.*

*Commonwealth vs. Wheeler, 205 Mass. 384; 91 N. E. 415.*

*State of Iowa vs. Schlenker, 112 Iowa 642; 51 L. R. A. 347.*

*State vs. Crescent Creamery Co. (1901) 83 Minn. 284; 54 L. R. A. 466; 86 N. W. 107.*

*Kansas City vs. Cook, (1890) 38 Mo. App. 660.*

*City of St. Louis vs. Grafeman Dairy Co. 190 Mo. 507; 1 L. R. A. (N. S.) 296.*

*State vs. Campbell, 64 N. H. 404.*

*Blazier vs. Miller, 10 Hun 35.*

*Commonwealth vs. Smyth, 14 R. I. 100.*

Is it any argument to say that the Legislature may fix a standard for milk "because it is a natural product, the adulteration of which is a simple matter." (Brief of Plaintiff in Error, page 31 ).

Is the protection of the public health and the prevention of fraud and deception, to be determined upon the simplicity with which the adulteration can be made?

There is all the more reason for a standard where the adulteration and fraud is readily concealed.

*The argument of the Plaintiff in Error is, that, where adulteration is easy, as in milk, it is to be prevented. Where it is ingenious, as in ice cream, it is to be permitted, and no laws should be made against it.*

Recipes are contained in the brief of the Plaintiff in Error in this case, and also in the case of Hutchinson Ice Cream Company against the State of Iowa, argued herewith, some of which show that there is little cream used, and some, such as "The Manual for Army Cooks" show no cream used.

The State of Pennsylvania in fixing the standards of food values for its citizens, is not bound by the regulations for the army.

The relevancy of the case of *Muller vs. Oregon*, 208 U. S., 417; 52 L. Ed. 551, cited by Plaintiff in Error, which sustains the law regulating the hours of labor of women, as against the right to contract, is not apparent, except as above quoted.

The following states, other than Pennsylvania, have fixed standards of ice cream, which contain, among other things, the minimum of milk fats mentioned:

*Arizona.*

The Secretary of Agriculture is authorized to fix standard of purity of food.

*California. (1915)*

Ice cream, 10 per cent.

Fruit and nut ice cream, 8 per cent.

*Colorado. (1913)*

Ice cream, 14 per cent.

Fruit and nut ice cream, 12 per cent.

*Iowa. (1915)*

Ice cream, 12 per cent.

Fruit and nut ice cream, 10 per cent.

*Kansas. (1909)*

Ice cream, 14 per cent.

Fruit and nut ice cream, 12 per cent.

*Maine.*

Standard authorized to be fixed by Commissioner of Agriculture.

*Maryland. (1910)*

Ice cream, 4 per cent.

Fruit and nut ice cream, 4 per cent.

*Massachusetts. (1913)*

Ice cream, 7 per cent.

*Michigan. (1909)*

Ice cream, 10 per cent.

Fruit and nut ice cream, 8 per cent.

*Minnesota. (1907)*

All ice cream, 12 per cent.

*Montana. (1913).*

All ice cream, 14 per cent.

*Nebraska. (1914)*

Ice cream, 14 per cent.

Fruit ice cream, 12 per cent.

*New Hampshire. (1907)*

All ice cream, 14 per cent.

*Oregon.*

Ice cream, 12 per cent.

Fruit and nut ice cream, 9 per cent.

*South Dakota. (1909)*

Chapter 296. No copy of law.

*Virginia.*

All ice cream, 8 per cent.

*Texas.*

Food Commissioner authorized to adopt standard.

*Wisconsin. (1913)*

Ice cream, 14 per cent.

Fruit and nut ice cream, 12 per cent.

*Delaware, Florida, Georgia, Nevada and South Carolina* have the same standard as fixed in the Federal law.

In the opinion of the Court in the case of *Hutchinson Ice Cream Company vs. State of Iowa*, 40 Oct. Term 1915, to be argued herewith, (Record, page 14), Judge Preston says:

"It appears that in SEVENTEEN states the standard fixed for ice cream to be sold, is FOURTEEN per cent; FIVE states have fixed the standard at TWELVE per cent. butter fat, the same as our own; but FIVE states which have legislated have a lower standard than Iowa: the Federal government fixes the standard for ice cream at fourteen per cent. It should be said as to the fourteen per cent. standard fixed by the Federal Government, that it is not claimed that such standard has been fixed by law, but by the United States Department of Agriculture."



The diligence of counsel in this case was not rewarded by a complete list of the states, but so far as ascertained only two states, Maryland and Massachusetts, have fixed a lower standard of butter fat for ice cream than Pennsylvania.

*It is to be noted that those states which have more recently fixed the standard, have made it 14%.*

Therefore, conceding the right to classify ice cream, and fix a standard therefor, the standard fixed in this Act of Assembly cannot be said to be unreasonable.

*It is worthy of note, that, although some states have had the standard for ice cream for nine (9) years, and,—as found by the Supreme Court of Iowa in the Hutchinson case argued herewith (Record, p. 14) twenty-seven (27) states have adopted standards,—the right to enact this legislation has been so generally conceded and acquiesced in, that, with the exception of these two cases now before the court, only one other, that of Rigbers vs. Atlanta, 66 S. E. Rep. 991, has been found.*

*This shows, not only a legislative understanding but an acquiescence by the trade and the legal profession, that the power to so legislate exists.*

This also shows a declaration by the Legislatures of a large number of states that the protection to the public health and the prevention of fraud and deception in the manufacture and sale of ice cream, requires a standard. This Court must assume that these Legislatures passed their statutes in good faith.

The Court cannot strike such a statute down unless it finds it has no relation to the subject of adulteration or of fraud.



In *Powell vs. Pennsylvania*, 127 U. S., 678; 32 L. Ed. 253, Mr. Justice Harlan said, page 684; 256:

"But it (the Court) cannot adjudge that the defendant's rights of liberty and property, as thus defined, have been infringed by the statute of Pennsylvania, without holding that, although it may have been enacted in good faith for the objects expressed in its title, namely, to protect the public health and to prevent the adulteration of dairy products and fraud in the sale thereof, it has, in fact, no real or substantial relation to those objects."

The Plaintiff in Error argues that "ice cream is not a milk product," and that the Act itself recognizes that ice cream is not a milk product.

Because the Act does not define ice cream is no reason for saying that ice cream is not a milk product or that the Act recognizes it as anything else than a milk product. Because it contains more sugar than the total milk solids, does not prove that it is not a milk product.

Vinegar contains more water than the total apple solids, but it cannot be said to be a water product.

Adding water to milk is not practicing any more fraud or deception than manipulating a product called ice cream with only 2.7 per cent. butter fat, as shown in this case, when the statute of Pennsylvania requires that milk alone shall contain  $3\frac{1}{4}$  per cent. of butter fat.

*Can it be said that the Legislature could not constitutionally define ice cream, and require that it should contain a certain proportion of cream or of milk?*

*If that be admitted, then, butter fat, being found only in cream and milk, it follows that the Legislature, instead of defining ice cream and fixing the quality of cream or milk that must go into its composition, may*

arrive at the same result by fixing the quantity of butter fat which must be found therein.

This case, and the constitutionality of this Act of Assembly, is not to be determined by whether the specific sale of the ice cream in question was in itself a fraud. As is well said by Judge Henderson of the Supreme Court, (Record, page 89) :

*"If by the exercise of ingenuity and by the practice of unwarranted thrift, a product can be put on the market having the name and appearance of ice cream, but lacking the chief element which gives it value as an article of food, a large opportunity would be afforded to dealers in that article to profit by deception and it is the opportunity for such deceit of which the police power takes notice and seeks to take away. It is not necessary that injury has been done or wrong perpetrated. The possibility that such results may take place warrants legislative intervention under the police power . . . It is not a successful denial of the exercise of these powers to say that the prohibited article is wholesome and not injurious to the consumer. The wholesomeness of the prohibited thing will not render the Act unconstitutional. The temptation to fraud and adulteration may be a consideration leading to regulative or prohibitive legislation. If it were not so Courts would become the triers of the expediency of such legislation and the authority which the people committed to the Legislature would be transferred by judicial action to the Courts."*

Therefore, because ice cream is so readily susceptible, in its manufacture, both of adulteration and fraud, a statute fixing a standard of butter fat is valid.

## II.

THE ACT IS A VALID EXERCISE OF THE POLICE POWER.

There is no question of interstate commerce in this case.

"The police power is an attribute of sovereignty, and exists without any reservation in the constitution, being founded upon the duty of the State to protect its citizens and to provide for the safety and good order of society."

*22 Am. & Eng. Ency. of Law, 918-9 and notes.*

The power belonged to the states when the Federal Constitution was adopted. They did not surrender it, and they all have it now. It extends to the entire realm of business within their local jurisdictions.

"As understood in American Constitutional Law, the police power simply means the power to impose such restriction upon private rights as are practically necessary for the general welfare of all."

*State vs. Wagner, 77 Minn. 483; 77 Am. St. Rep. 681; 46 L. R. A. 442.*

*In re License Cases, 5 Howard 504; 12 L. Ed. 256.*

*Munn vs. Illinois, 94 U. S. 113; 24 L. Ed. 77.*

In *Barbier vs. Connolly, 113 U. S. 31; 28 L. Ed. 924*, the Supreme Court said, with reference to the 14th Amendment:

"But neither the Amendment, broad and comprehensive as it is, nor any other amendment, was

designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity."

To sustain a statute as an exercise of the police power the courts must only be able to see that it has, among other things, some relation to the public health, morals and general welfare.

*Lawton vs. Steele*, 152 U. S. 133, 39 L. Ed. 202.

*Powell vs. Pennsylvania*, 127 U. S. 678; 32 L. Ed. 253.

The prevention of fraud and deception in food products has to do not only with the public welfare, but also with the public health and the public morals.

That subject, therefore, is within the police power of the state.

The exercise of that power is only controlled by the commerce clause of the United States Constitution, or regulated by the due process clause of the 14th Amendment.

This case seems to be settled by *Powell vs. Pennsylvania*, 127 U. S. 678; 32 L. Ed. 253.

*In the brief of the Plaintiff in Error it is argued that the Powell case does not prohibit the sale of a wholesome article of food, and that therefore ice cream, with ingredients weakened to any extent by adulteration otherwise, can be sold with impunity, if it is not officially deleterious to health.*

In the Powell case the validity of the Pennsylvania Act prohibiting the manufacture of chrysanthemum was

in question. The Defendant in the trial Court offered to prove that the article was pure and substantial, and the evidence was conflicting. Objections were not sustained on either point as sufficient evidence could still be put out against or in favor of admitted testimony, as an illustration of the error.

Mr. Justice Martin said, page 693, 2001:

"It is scarcely necessary to say that if this statute is a legitimate exercise of the police power of the State for the protection of the health of the people, and for the preservation of morals, it is not inconsistent with that (1881) amendment; for it is the settled doctrine of this court that no government is organized for the purpose, among others, of preserving the public health and the public morals; it cannot almost boast of the power to provide for those objects; and that the 1881 amendment was not designed to interfere with the exercise of that power by the state."

And to this day the manufacture of any alcoholic liquor is prohibited in Pennsylvania, and the sale of any intoxicating manufactured article, if colored or adulterated or pulled together, is also prohibited in Pennsylvania.

The argument of the Plaintiff in Error is that the Howell case is not controlling, because it turned upon the question of evidence, and he cites the dissenting opinion of Mr. Justice Gray in the case of *Schlotter-Dringen vs. Pennsylvania*, 172 U. S. 21, 12 U. H. 10, as authority for that argument.

But the controlling opinion of Mr. Justice Holmes in that case, referring to the Howell case, said (p. 101, 102):



"The Legislature of the State has the power in many cases to determine as a matter of state policy whether to permit the manufacture and sale of articles within the State, or to entirely forbid such manufacture and sale, so long as the legislation is confined to the manufacture and the sale within the State. Those are questions of public policy which, as was said in the case of Powell, belong to the Legislative department to determine; but the legislative policy does not extend so far as to embrace the right to absolutely prohibit the introduction within the limits of the State of an article like oleomargarine, properly and honestly manufactured."

It must be borne in mind that in this case, there is no question of the importation of ice cream into Pennsylvania. The question of commerce does not arise. The only question which arises is the power of the State of Pennsylvania, as was said by Judge Peckham in the Powell case, "to determine as a matter of state policy" whether it will permit the manufacture and sale of ice cream containing less than eight (8) per cent butter fat, where fruit or nuts are not used.

*This is not a question of purity, it is a question of fraud and deception.*

The Pennsylvania statute which prohibits the addition of water to vinegar in the process of manufacture, has been sustained.

*Commonwealth vs. Burtnett, 58 Pa. Super. Ct. 604.*

If the state may prohibit the addition of water to milk, or to vinegar in its manufacture, can it not prohibit the addition of water to ice cream?



If, instead of prohibiting the addition of water to ice cream, may it not reach the same end, by fixing a standard of butter fat?

In addition to the authorities heretofore cited, regulating the sale of milk, the following authorities regulate the sale of other products, and have been sustained as a proper exercise of the police power.

Legislation affecting the production and manufacture of vinegar :

*People vs. Girard*, 145 N. Y., 105; 39 N. E. 823.

*People vs. Worden Grocery Co.*, 118 Mich., 604; 77 N. W. 315.

*People vs. Heinz Co.*, 90 App. Div. 408; 86 N. Y. Supp. 141.

*Commonwealth vs. Burtnett*, 58 Pa. Super. Ct. 604.

Preventing the addition of wholesome cereal to sausage.

*People vs. Dehn*, 155 N. W. 744.

Statutes regulating baking powder.

*State vs. Layton*, 160 Mo. 474; 62 L. R. A. 163; 187 U. S. 356; 47 L. Ed. 214.

Regulating renovated butter.

*Commonwealth vs. Seiler*, 20 Pa. Super. Ct. 360.

Oleomargarine.

*Commonwealth vs. Huntley*, 156 Mass. 236; 15 L. R. A. 839.

*Plumley vs. Mass.*, 155 U. S., 461; 39 L. Ed. 223.

*Commonwealth vs. McCann*, 14 Pa. Super. Ct. 231.

In the case of *Commonwealth vs. Pflaum*, 236 Pa., 294, the Pennsylvania statute which prohibited sulphur dioxide in candy, in any quantity, was sustained.

The act was attacked because it classified candy differently from other foods and made different provisions for wholesale and retail dealers, and therefore deprived the defendant of his property without due process of law and denied him the equal protection of the laws. The act was sustained.

Mr. Justice Pitney, by a letter dated June 1, 1912, addressed to counsel, declined to allow a writ of error. The order, however, is not reported.

*If it be a valid exercise of the police power to prohibit the making of an article appear of greater value than it is, does not that power extend to ice cream?*

In *Crosman vs. Lurman*, 192 U. S. 189, 48 L. Ed. 401, the statute of New York which prohibited adulteration, if an article "be colored or coated or polished or powdered whereby damage or inferiority is concealed, or it is made to appear better than it really is, or of greater value," was sustained. The offense consisted in coating coffee beans with a yellow wash and there is no allegation that the wash was injurious to health.

Is it possible that fraud and deception which may be detected by the naked eye, as in this case, can be guarded against by legislation, but fraud and deception in the manufacture of ice cream which cannot be detected by the purchaser, is to remain immune from statutory regulations?

If it is within the police power of the State to fix, by ordinance, the standard size of a loaf of bread which can

be seen by the purchaser with the naked eye, as it was held in the case of *Schmidinger vs. Chicago*, 226 U. S., 578; 57 L. Ed. 364, it is difficult to conceive upon what theory a statute, which fixes a standard of butter fat in ice cream, could be stricken down.

For these reasons it is confidently submitted that this statute is a valid exercise of the police power.

Great stress is laid upon the case of *Rigbers vs. Atlanta*, 66 S. E. Rep. 991.

If this case may be said to sustain the contention of the Plaintiff in Error, then it is distinctly in the teeth of *Powell vs. Pennsylvania*, *supra*. It should be noted that the learned Judge, in writing that opinion, apparently could find no decided case to support his reasoning. None is cited. That case was decided upon the proposition that the municipality could not fix a standard by ordinance, without express legislative authority. There is, however, a statement in that case, that the standard of butter fat fixed by the ordinance is not necessary "or essential to the wholesomeness of milk or milk products." *The learned Judge did not seem to discover that it was the opportunity for perpetrating a fraud which justified legislation, and not the actual perpetration thereof.*

It is therefore confidently asserted that this Act of Assembly is a valid exercise of the police power of Pennsylvania.

## III.

THE ACT DOES NOT VIOLATE EITHER THE EQUAL PROTECTION,  
OR THE DUE PROCESS CLAUSES OF THE FEDERAL  
CONSTITUTION.

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*Due Process of Law.*

The Assignments of Error raise the proposition that the Plaintiff in Error is deprived of his property without due process of law, in violation of the 14th Amendment to the Constitution of the United States.

To justify such contention the subject matter must be outside of the domain of the police powers.

In *Mugler vs. Kansas*, 123 U. S. 623; 31 L. Ed. 205, Mr. Justice Harlan said (p. 665, 211):

“The principle, that no person shall be deprived of life, liberty or property, without due process of law, was embodied, in substance, in the constitutions of nearly all, if not all, of the states, at the time of the adoption of the 14th amendment, and it has never been regarded as incompatible with the principle,—equally vital, because essential to the peace and safety of society,—that all property in this country is held under the implied obligation that the owner’s use of it shall not be injurious to the community.”

Wherever regulation of property has been found to be within the police power, it has also been held not to violate the 14th Amendment guarantying due process of law.

*Welsh vs. Swasey*, 193 Mass. 364; affirmed in 214 U. S. 91.

*Reduction Company vs. Sanitary Works*, 199 U. S. 306; 50 L. Ed. 204.

*Health Department vs. Trinity Church*, 145 N. Y. 32; 45 Am. St. Rep. 579.

In the case of *Schmidinger vs. Chicago*, 226 U. S. 678; 57 L. Ed. 364, the ordinance arbitrarily fixing the weight of a loaf of bread was sustained as not violating the Federal Constitution, either as to due process of law, or as to the equal protection of the laws.

In *State vs. Addington*, 77 Mo. 110, it is said:

"The mere fact, as said in this case, that experts may pronounce a manufactured article intended for human food to be wholesome and harmless, does not render it incompetent for the Legislature to prohibit the manufacture and sale of the article."

And in *Schollenberger vs. Pennsylvania*, 171 U. S. 1; 43 L. Ed. 49, the only departure from the rule laid down in *Powell vs. Pennsylvania*, 127 U. S. 678, is that stated on page 23 of the opinion in the Schollenberger case.

"In the absence of Congressional legislation therefor, the right to import a lawful article of commerce from one state to another, continues until a sale in the original package in which the article was introduced into the State."

In *Smith vs. St. Louis and Southwestern Rwy Co.*, 181 U. S. 247; 45 L. Ed. 847, and in *Austin vs. Tenn.*, 179 U. S. 343; 45 L. Ed. 224, the Court made it plain that the Schollenberger case was only extended to cover oleomargarine in the original package.



This Court, in the case of *Smith vs. St. Louis and Southwestern Ry. Co.*, *supra*, (p. 255, 850) said:

*"A state has power to regulate the introduction of any article, including a food product, so as to insure purity of the article imported."*

*If the State can regulate so as to insure purity, can it not regulate so as to prevent fraud?*

In *Commonwealth vs. Kevin*, 202 Pa. 23, the statute prohibited salicylic acid. The indictment was for the sale of a pint of raspberry syrup alleged to contain salicylic acid.

*"The Court excluded the testimony offered by the defendant to prove the quantity of acid present, and to prove that in fact the quantity used was entirely harmless and not poisonous or injurious to health, and charged that the jury might convict, if they found salicylic acid present in any quantity."*

In *Phumley vs. Massachusetts*, 155 U. S. 461; 39 L. Ed. 223 the Court said (p. 479, 230):

*"The judiciary of the United States should not strike down a legislative enactment of a state,—especially if it has direct connection with the social order, the health and morals of its people,—unless such legislation plainly and palpably violates some right granted or secured by the National Constitution or encroaches upon the authority delegated to the United States for the obtainment of objects of national concern."*

In *Iowa vs. Snow*, 81 Iowa 642, 11 L. R. A. 355, a statute regulating the sale of lard, so that the public



may know by an inspection of the package, the ingredients used in its preparation, was held not to violate the Federal Constitution as to due process of law.

This act of assembly fixes a standard of butter-fat for ice cream.

It provides in Section 4:

"No ice cream shall be sold within this State containing less than eight per centum butter-fat," etc.

It fixes a penalty for violation of the Act.

This Act provides against selling "ICE CREAM" containing less than 8 per cent. butter-fat. It does not prohibit selling under some name such as "frozen skimmed-milk," or other suitable name, a commodity which may contain less than 8 per cent. butter fat, provided it is not known or sold as "ice cream."

The Plaintiff in Error is a citizen of Pennsylvania. This statute operated upon him, as well as all other citizens of Pennsylvania. It was in force before he purchased the ice cream in question.

For the reasons given and the authorities cited, he cannot be said to have been deprived of his property without due process of law.

*Equal Protection of the Laws.*

The Pennsylvania statute applies to all ice cream of every kind, and wherever made. If there is a right to classify ice cream and to separate it from other food products, then the standard to be fixed is a matter for the Legislature, not for the Courts.

If there is some reasonable relation between the health, morals, and general welfare of the public and

the fixing of a standard for ice cream, then the right to classify ice cream and fix the standard exists.

In *Lieberman vs. Van De Carr*, 199 U. S., 552; 50 L. Ed. 305, which involved the constitutionality of the Code of the city of New York, with regard to the sale of milk, it appears that Lieberman was arrested and committed. He sued out a writ of habeas corpus. The case finally reached the Supreme Court of the United States and this Court said, page 563:

"Nor do we think there is force in the contention that the plaintiff in error has been denied the equal protection of the laws, because of the allegation that the milk business is the only business dealing in foods which is thus regulated by the sanitary code. All milk dealers with the city are equally affected by the regulations of the sanitary code. It is primarily for the State to select the kinds of business which shall be the subject of regulation, and if the business affected is one which may be properly the subject of such legislation, it has no valid objection that similar regulations are not imposed upon other business of a different kind."

In *Barbier vs. Connolly*, 113 U. S., 27; 28 L. Ed. 934 it is said (p. 32, 925):

"Class legislation, discriminating against some and favoring others, is prohibited but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment."

In *Connolly vs. Sewer Pipe Company*, 184 U. S., 540, 46 L. Ed., 679, Mr. Justice Harlan said, (page 558, 689):

"No rule can be formulated that will cover every case, but upon this general question we have said that the guaranty of the equal protection of the laws means 'that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and in like circumstances'. *Missouri vs. Lewis*, 101 U. S., 22, 31. We have also said: 'The Fourteenth Amendment \* \* \* undoubtedly intended, not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; . . . that no impediment should be interposed to the pursuits of anyone except as applied to the same pursuits by others under like circumstances.'"

"Classification is a legislative question, subject to revision only so far as to see that it is founded on real distinctions in the subjects classified, and not on artificial or irrelevant ones, used for the purpose of evading the constitutional prohibition. If the distinctions are genuine, the courts cannot declare the classification void, though they may not consider it to be on a sound basis. The test is not wisdom but good faith in the classification.

*Seabold vs. Commissioners of Northumberland Co.*, 187 Pa., 318.

*Wheeler vs. Philadelphia*, 77 Pa., 338.

*In re Sugar Notch Borough*, 192 Pa., 395.

In *Powell vs. Pennsylvania*, 127 U. S., 678, 32 L. Ed. 353, it is said, page 687, 257:

"The statute places under the same restrictions,

and subjects to like penalties and burdens, all who manufacture, or sell, or offer for sale, or keep in possession to sell, the articles embraced by its prohibitions; thus recognizing and preserving the principal of equality among those engaged in the same business."

In *Lawton vs. Steele*, 152 U. S., 133, 38 L. Ed. 385, Mr. Justice Brown said, page 136, 388:

"Beyond this, however, the State may interfere wherever the public interests demand it, and in this particular a large discretion is necessarily vested in the legislature to determine, not only what the interests of the public may require, but what measures are necessary for the protection of such interests."

It is no longer an open question that various commodities may be classified either in the interests of the public health, or to prevent fraud and deception in their manufacture and sale, and if vinegar, baking powder, coffee, lard, tea, oleomargarine, butter, may be classified, which the courts have already decided, as hereinbefore pointed out, what possible objection can there be to classifying ice cream?

If fraud and deceit may be prevented by law, by prohibiting a coating on the outside of a coffee bean, (*Crossman vs. Lurman*, 192 U. S., 189), it may also be prevented by prohibiting the use of skimmed milk in ice cream. This prevention may be accomplished either by prohibiting the use of skimmed milk, in terms, or by fixing the standard of butter fats.

If the law applies to all ice cream and to all dealers in it, it does not offend against the equal protection clause of the Federal constitution.

If ice cream may easily be adulterated or weakened in its food value; if fraud and deception may be practised in its manufacture; then the regulation of it has a direct relation to the morals and welfare of the people, to say nothing of the public health.

The relation is not only a reasonable one:

(And here is where the inquiry and the function of this court ends—the rest is a legislative problem.)

But Pennsylvania has been reasonable even in its solution, for of all the twenty-seven states which have legislated upon the subject, only two have fixed a lower standard, three have fixed the same, and twenty-two higher standards.

#### CONCLUSION.

For the reasons urged in this brief, as well as those so well stated in the opinion of Judge Henderson in the Superior Court of Pennsylvania, which was adopted by the Supreme Court (Record, page 88), and those given in the opinion of the Supreme Court of Iowa, in the case of *Hutchinson Ice Cream Company vs. Iowa* (Record of that case, page 9), it is confidently submitted:

1. That ice cream, being susceptible not only of adulteration, but also of fraud and deceit in its manufacture, its regulation is a proper subject for the exercise of the police power.

2. That the classification of ice cream, by legislation fixing a standard, is founded on a real distinction in the interest of the public welfare.

3. That the classification itself is reasonable.

Therefore, the Act of Assembly of Pennsylvania, of



March 24, 1909, P. L. 62, does not offend against the 14th Amendment to the Constitution of the United States, either in taking property without due process of law, or in denying the equal protection of the laws.

The judgment of the Supreme Court of Pennsylvania should therefore be affirmed.

Wm. H. Hanson,

*Deputy Attorney-General*

Francis Simon Brown,

*Attorney-General*

For Commonwealth of Pennsylvania

Defendant in Error.





242 U. S.            Argument for Plaintiffs in Error.

HUTCHINSON ICE CREAM COMPANY ET AL. v.  
STATE OF IOWA.<sup>1</sup>

ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

CROWL v. COMMONWEALTH OF  
PENNSYLVANIA.

ERROR TO THE SUPREME COURT OF THE STATE OF  
PENNSYLVANIA.

Nos. 40, 50. Argued November 13, 1916.—Decided December 4, 1916.

Laws forbidding the sale, offering for sale, etc., as "Ice Cream" of any article not containing butter-fat in reasonable proportion fall fairly within the state police power.

The fact that the name "Ice Cream," as commonly used, includes many compounds which are entirely wholesome yet contain no cream or butter-fat, does not render such legislation arbitrary or unreasonable, but tends rather to support it as serving to prevent the public from being misled in the purchase of a food article of general consumption.

Whether the State may prohibit the sale of wholesome products if the public welfare seems to require such action is a question not involved in these cases.

168 Iowa, 1; 245 Pa. St. 554, affirmed.

THE case is stated in the opinion.

*Mr. Walter Jeffreys Carlin and Mr. R. L. Parrish* for plaintiffs in error:

While the police power may be exercised to protect the public health, morals, safety and general welfare, it may

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<sup>1</sup> Pursuant to stipulation, the case of *Sanders Ice Cream Co. et al. v. State of Iowa*, No. 39, October Term, 1916, in error to the Supreme Court of the State of Iowa, was argued on the record in the *Hutchinson Case*, *supra*, and disposed of in the same way.

not destroy private rights arbitrarily; and whether its exercise in a given case is valid or not is a judicial question.

"Ice Cream" is a generic term, embracing a large number and variety of products, many of which, though entirely wholesome, do not contain either cream of milk or butter-fat. The term, as generally used and understood, does not imply the presence of such ingredients in definite proportions or at all. The product, thus broadly defined, is not an imitation or substitute for any other confection or food, but an admittedly wholesome article passing honestly by its own name.

The standard enacted is purely arbitrary. The legislature selects one variety of the product and declares that henceforth all other varieties of the same product shall cease to bear the name under which they have customarily been sold for more than a hundred years. The percentages are without reasonable basis. It also arbitrarily excludes from the standard product ingredients which are wholesome and commonly employed. Such arbitrary classifications are unconstitutional. *Truax v. Raich*, 229 U. S. 33; *People ex rel. Farrington v. Mensching*, 187 N. Y. 8; *Nichols v. Ames*, 173 U. S. 509, 521; *State v. Miksicek*, 125 S. W. Rep. 501.

The legislation has no tendency to prevent fraud. The cases involving colored oleomargarine have no application, there being here no substitute for a well known article of food. See *State v. Layton*, 61 S. W. Rep. 171, 176. The cases concerning milk are inapplicable. Milk is a definite product of nature. Its quality has been standardized to protect health and prevent fraud. *Rigbers v. City of Atlanta*, 66 S. E. Rep. 991; *People v. Biesecker*, 169 N. Y. 53, 57. Neither do cases apply which concern regulations of weight and measure.

This legislation if sustained, must be sustained solely as tending to prevent fraud, and only on the basis of the

242 U. S. Counsel for the Commonwealth of Pennsylvania.

situation as it existed before the enactment, not on the basis of a situation created by the legislation itself, and since the incontrovertible facts of common knowledge absolutely negative the possibility that any purchaser of ice cream could have been misled by the term "ice cream" into assuming that the name implied any particular proportionate butter-fat content, or that the product was made of dairy cream alone, it necessarily follows that no fraud was possible and hence the law cannot be sustained as a police measure tending to prevent fraud and deceit.

The legislature cannot prohibit the sale of a wholesome commodity in the absence of fraud; but such is the effect of this legislation if sustained. When manufacturers are deprived of the name under which their product is always bought and sold, they are deprived of the right to sell it, their business is injured, and their property taken. The privilege to sell it as something else is a privilege of no value.

Under the Pennsylvania law ice cream containing less than 8 per cent. of butter-fat can not be sold under any name. This would absolutely forbid the sale of an innocent and wholesome commodity. It can not be done. See decision of the Iowa Supreme Court in the *Hutchinson Case*; also *Rigbers v. City of Atlanta*, *supra*; *State v. Hanson* (Minn.), 136 N. W. Rep. 412; *People v. Marx*, 99 N. Y. 383, 387; *People v. Biesecker*, *supra*.

Mr. George Cosson, Attorney General of the State of Iowa, for the State of Iowa.

Mr. William M. Hargest, Deputy Attorney General of the Commonwealth of Pennsylvania, with whom Mr. Francis Shunk Brown, Attorney General of the Commonwealth of Pennsylvania, was on the brief, for the Commonwealth of Pennsylvania.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

These cases were argued together. In each a state statute which prohibits the sale of ice cream containing less than a fixed percentage of butter-fat is assailed as invalid under the Fourteenth Amendment; the Supreme Court of each State having held its statute constitutional. *State v. Hutchinson Ice Cream Co.*, 168 Iowa, 1; *Commonwealth v. Crowl*, 245 Pa. St. 554. Iowa makes 12 per cent. the required minimum; Pennsylvania 8 per cent. The material provisions of the several statutes are copied in the margin.<sup>1</sup>

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<sup>1</sup> Iowa: Code Supp., 1913, § 4999-a20:

"No person, firm or corporation, . . . shall manufacture or introduce into the state, or solicit or take orders for delivery, or sell, exchange, deliver or have in his possession with the intent to sell, exchange or expose or offer for sale or exchange, any article of food which is adulterated or misbranded, within the meaning of this act."

Code Supp., 1913, § 4999-a31e:

"For the purpose of this act, an article of food shall be deemed to be adulterated:

"First. If any substance or substances has or have been mixed and packed with it so as to reduce or lower or injuriously affect its quality, strength or purity.

"Second. If any substance or substances has or have been substituted wholly or in part for the article.

"Third. If any valuable constituent of the article has been wholly or in part abstracted.

"Fourth. If it does not conform to the standards established by law."

Chap. 175, Acts 34th G. A. (1911), p. 192:

"ICE-CREAM."

"1. Ice-cream is the frozen product made from pure wholesome sweet cream, and sugar, with or without flavoring, and if desired, the addition of not to exceed one per cent. (1%) by weight of a harmless thickener, and contains not less than twelve per cent. (12%) by weight

The right of the State under the police power to regulate the sale of products with a view to preventing frauds or protecting the public health is conceded by plaintiffs in error. And they do not contend that the particular percentages of butter-fat set by Iowa and Pennsylvania are so exacting as to be in themselves unreasonable. Thirteen other States have by similar legislation set 14 per cent. as the minimum; five other States 12 per cent.; only eight States have fixed a percentage as low as Pennsylvania; and

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of milk fat, and the acidity shall not exceed three tenths (3-10) of one per cent (1%)."

Pennsylvania: P. L., 1909, p. 63, Purden's Dig., vol. 5, p. 5209:

"An act for the protection of the public health and to prevent fraud and deception in the manufacture, sale, offering for sale, exposing for sale, and having in possession with intent to sell, of adulterated or deleterious ice cream; fixing a standard of butter fat for ice cream; providing penalties for the violation thereof, and providing for the enforcement thereof.

"SECTION 1. *Be it enacted, &c.*, That no person, firm, or corporate body, by himself, herself, itself or themselves, or by his, her or their agents, servants, or employees, shall sell, offer for sale, expose for sale, or have in possession with intent to sell, ice cream adulterated within the meaning of this act.

"SECTION 2. Ice cream shall be deemed to be adulterated within the meaning of this act—

"*First.* If it shall contain boric acid, formaldehyde, saccharine, or any other added substance or compound that is deleterious to health.

"*Second.* If it shall contain salts of copper, iron oxide, ochres, or any coloring substance deleterious to health: *Provided*, That this paragraph shall not be construed to prohibit the use of harmless coloring matter in ice cream, when not used for fraudulent purposes.

"*Third.* If it shall contain any deleterious flavoring matter, or flavoring matter not true to name.

"*Fourth.* If it be an imitation of, or offered for sale under, the name of another article. . . .

"SECTION 4. No ice cream shall be sold within the State containing less than eight (8) per centum butter fat, except where fruit or nuts are used for the purpose of flavoring, when it shall not contain less than six (6) per centum butter fat."



the United States Department of Agriculture has declared 14 per cent. to be standard.<sup>1</sup> The main objection urged is this: To require that ice cream, in order to be legally salable, must contain some butter-fat is a regulation so unreasonable and arbitrary as to be a deprivation of property without due process of law and a denial of the equal protection of the laws. To support this contention the following trade facts are shown:

The ice cream of commerce is not iced or frozen cream. It is a frozen confection—a compound. The ingredients of this compound may vary widely in character, in the number used and in the proportions in which they are used. These variations are dependent upon the ingenuity, skill and judgment of the maker, the relative cost at a particular time or at a particular place of the possible ingredients, and the requirements of the market in respect to taste or selling price. Thus, some Philadelphia Ice Cream is made of only cream, sugar and a vanilla flavor. In making other Philadelphia Ice Cream the whites of eggs are added; and according to some formulas Vanilla Ice Cream may be made without any cream or milk whatsoever; for instance by proper manipulation of the yolks of eggs, the whites of eggs, sugar, syrup and the vanilla bean. All of these different compounds are commonly sold as ice cream; and none of them is necessarily unwholesome.

Plaintiffs in error contend that as ice cream is shown to be a generic term embracing a large number and variety of products and the term as used does not necessarily imply the use of dairy cream in its composition, it is arbitrary and unreasonable to limit the ice cream of commerce to that containing a fixed minimum of butter-fat. But the legislature may well have found in these facts persuasive

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<sup>1</sup> The requirements of the several States are set forth in U. S. Department of Agriculture (Bureau of Animal Industry) Circular 218, on Legal Standards for Dairy Products.

evidence that the public welfare required the prohibition enacted. The facts show that in the absence of legislative regulation the ordinary purchaser at retail does not and cannot know exactly what he is getting when he purchases ice cream. He presumably believes that cream or at least rich milk is among the important ingredients; and he may make his purchase with a knowledge that butter-fat is the principal food value in cream or milk. Laws designed to prevent persons from being misled in respect to the weight, measurement, quality or ingredients of an article of general consumption are a common exercise of the police power. The legislature defines the standard article or fixes some of its characteristics; and it may conclude that fraud or mistake can be effectively prevented only by prohibiting the sale of the article under the usual trade name, if it fails to meet the requirements of the standard set. Laws prohibiting the sale of milk or cream containing less than fixed percentages of butter-fat present a familiar instance of such legislation. Cases in the state courts upholding laws of this character are referred to in the margin.<sup>1</sup> This court has repeatedly sustained the validity of similar prohibitions. *Schmidinger v. Chicago*, 226 U. S. 578; *Armour & Co. v. North Dakota*, 240 U. S. 510.

It is specially urged that the statutes are unconstitutional because they do not merely define the term ice cream; but arbitrarily prohibit the sale of a large variety of wholesome compounds theretofore included under the name ice cream. The acts appear to us merely to prohibit the sale of such compounds as ice cream. Such is the construction given to the act by the Supreme Court of Iowa.

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<sup>1</sup> *Iowa v. Schlenker*, 112 Iowa, 642; *State v. Campbell*, 64 N. H. 402; *People v. Bowen*, 182 N. Y. 1; *State v. Crescent Creamery Co.*, 83 Minn. 284; *Louisiana v. Stone*, 46 La. Ann. 147; *Deems v. Baltimore*, 80 Md. 164; *Commonwealth v. Wheeler*, 205 Mass. 384; *St. Louis v. Grafeman Dairy Co.*, 190 Mo. 507; *State v. Smyth*, 14 R. I. 100.

*State v. Hutchinson Ice Cream Co.*, 168 Iowa, 1, 15, which is of course binding on us. We cannot assume, in the absence of a definite and authoritative ruling, that the Supreme Court of Pennsylvania would construe the law of that State otherwise. The conviction here under review was for selling the "compound" as ice cream, so that we are not called upon to determine whether the State may in the exercise of its police power prohibit the sale even of a wholesome product, if the public welfare appear to require such action—and if, as here, interstate commerce is not involved. See *Powell v. Pennsylvania*, 127 U. S. 678, 685; *Schollenberger v. Pennsylvania*, 171 U. S. 1, 15.

In view of the conclusion stated above, it is unnecessary to consider whether the statutes are or are not sustainable as health measures; and upon this we express no opinion.

The judgment in each case is

*Affirmed.*